TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 136.

MARIA DE LAS NIEVES CABRERA AND MAGDALENA DE LA CRUZ, APPELLANTS,

vs.

THE AMERICAN COLONIAL BANK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

FILED JULY 24, 1907.

(20,799.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 21, 1908.

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1 At a stated term of the District Court of the United States for Porto Rico, begun a-d held at the City of San Juan, in the said District, on the 8th day of April, in the year of our Lord one thousand nine hundred and seven,—and in the one hundred and thirty-first year of the Independence of the United States of America.

Present: The Hon. Bernard S. Rodey, Judge.

Among the proceedings had was the rendition of a final decree on the 6th day of May, 1907, in the following cause, to wit:

AMERICAN COLONIAL BANK OF PORTO RICO, Plaintiff,

vs.

MARÍA DE LAS NIEVES CABRERA Y PRUNA and MAGDALENA DE LA CRUZ CABRERA Y PRUNA, Defendants.

Be it remembered that heretofore, to wit, on December 17, 1901, came said complainant by its solicitors, Pettingill and Keedy, and filed its bill of complaint, which is as follows, to wit:

Bill of Complaint.

To the Honorable William H. Holt, Judge of the United States District Court for the District of Porto Rico, sitting in chancery:

The American Colonial Bank, a corporation duly organized and existing under the laws of the State of West Virginia and a citizen of said State, and having an office and place of business in the City of San Juan in Porto Rico aforesaid, brings this its bill of complaint against Maria de las Nieves Cabrera y Pruna, Magdalena de la Cruz Cabrera y Pruna, and Banco Territorial y Agricola de Puerto Rico, a corporation duly organized under the laws of the Kingdom
2 of Spain and having a place of business in the City of San Juan aforesaid, residents of the said District of Porto Rico.

Thereupon your orator complaining says that on the twenty-first (21st) day of February, A. D., Nineteen hundred (1900) the mercantile firm of the said city of San Juan known as Sucesion de J. M. Suarez y Compañía were indebted to your orator in the sum of eight thousand (8,000) pesos in provincial money, current at that time, which said indebtedness was evidenced by a promissory note of that date, signed by the mercantile firm aforesaid as principals and by the said defendant Maria de las Nieves Cabrera y Pruna, as surety, payable to the order of your orator six (6) months after date with interest payable in advance at the rate of nine (9) per centum per year, and that on the date aforesaid for the purpose of further securing the payment to your orator of the said principal sum and interest specified in promissory note aforesaid, the said defendant Maria de las Nieves Cabrera y Pruna executed and delivered to your orator a certain indenture of mortgage dated on said twenty-first (21st) day of February Nineteen hundred (1900) whereby said defendant granted and conveyed to your orator under

and in accordance with the laws of Porto Rico then in force the following described property, to wit:

An urban property or one-story house built of brick with flat roof located at Number seventy-five (75) Sol Street in the third (3rd) Municipal district of the city of San Juan, bounded on its right by another house belonging to Mr. Pablo Corominas, on its left by another house belonging to Mrs. Asuncion Poch, and on its back by the backs of houses belonging to Mr. Ulises Alvarez Torres and Mr. Manuel Apellanis, said house having a measurement of five (5) meters seventy (70) centimeters front and thirty (30) meters twenty (20) centimeters deep.

And the said defendant in like manner ceded and transferred to your orator by said mortgage all and every real and personal
3 right which might belong to her as heir, as legatee or by virtue of any other clause by which she might be favored or bettered in the properties of her deceased mother, Mrs. Nieves Pruna y Van Rosi, giving to your orator ample faculties in order that without the concurrence of said defendant it might intervene and attend to all the acts of the will and testament of the said deceased and to the liquidation and adjudication of the inherited property.

Your orator further represents that the said defendant Maria de las Nieves Cabrera y Pruna did inherit as one of the devisees of her said mother Mrs. Nieves Pruna y Van Rosi by virtue of the last will and testament of the latter, executed in this city on the twenty-fourth (24th) day of February eighteen hundred ninety eight (1898) before Mauricio Guerra Mondragon y Mejias as a legatee of a third (⅓) part of the property of said decedent Subject to free disposition by her and that by other terms of said will she inherited a right of betterment in another third (⅓) part of said properties together with her sisters Mrs. Josefa, Mrs. Magdalena and Mrs. Anna Cabrera y Pruna; that included in the property left by the said decedent Mrs. Nieves Pruna y Van Rosi at the time of her death and in which the defendant aforesaid inherited and became entitled to the portions were the following described properties, to wit:

1. A half interest in a house Number twenty (20) San Francisco Street in the city of San Juan, bounded on the west by the property of the heirs of Doña María Nicolasa Lopez, on the back or north with that of Don Pedro Orcasitas, and on the east by that of Doña Magdalena and Doña Inocencia de la Cruz Cabrera.

2. A half interest in a house Number twenty-two (22) of the same San Francisco Street in the said city, bounded on the west by the said house Number twenty (20) of Doña Magdalena and Doña Inocencia de la Cruz, on the east by Cristo Street and on the back or north by the house of Don Pedro Ortiz.

3. A house Number eighty-nine (89) San Francisco Street
4 bounded on the right as it is entered by house of Don Manuel Cañal, on the left by that of Don Julian E. Blanco and on the back by that of Don Baldomero Hernandez.

4. The house Number thirty-seven (37) San Francisco Street of this city bounded on the right as it is entered by the house of Don

Domingo Font, on the left by that of the successors of Don Enrique Maria Nasas and on the back with that of Don Bernabe Chavarri.

5. The house Number eighty-one (81) Sol Street of this same city bounded on the right by that of the Sucesion Soler, on the left by that of the Reverend Andres Avelino David and on the back by that of Don Damian Esturio and Don Manuel Lazaro.

Your orator further represents that the said mortgage aforesaid further provided that the mortgaged property should respond in addition to the payment of the principal and interest specified in the promissory note aforesaid a further sum not exceeding one thousand (1,000) pesos for your orator's expenses, costs, damages and attorney's fees in case of the said lien upon the said property being enforced by judicial claim.

Your orator further represents that said mortgage contained however a condition subsequent that if the said commercial firm of Sucesion de J. M. Suarez y Compañía should pay to your orator the said sum of money with interest as provided in the promissory note aforesaid, then said mortgage and the estate thereby conveyed should cease and determine, but that if the amount of said note was not paid the property above described should be subject to the payment of the same with the addition mentioned for costs, expenses and attorney's fees as hereinbefore set forth, and the said mortgage was duly recorded in the registrar of property at the city of San Juan aforesaid on the fifteenth (15) day of March A. D. Nineteen hundred (1900), all of which will more fully appear from a copy of said mortgage herewith filed with a correct literal translation of the same into the English language, marked "Exhibit "A"., and prayed to be taken and considered *a as* part hereof.

5 Your orator further represents that subsequent to the delivery and recording of said mortgage to it on or about the twelfth (12) day of March Nineteen hundred one (1901) the said defendant Maria de las Nieves Cabrera y Pruna for the purpose of depriving your orator of the benefit of its security in the property so obtained by her as above set forth from her said mother, attempted to transfer and convey all her right, title and interest in said property to her co-defendant Magdalena de la Cruz Cabrera y Pruna, but your orator alleges that said pretended conveyance and transfer was made entirely without consideration and was accepted by said defendant Magdalena de la Cruz Cabrera y Pruna with full knowledge of the rights and claims of your orator against the said property attempted to be conveyed to her.

Your orator further represents that only the interest upon the said note for eight thousand (8,000) pesos had been paid to your orator and that the principal sum of the same which is equivalent to Four thousand eight hundred (4800) American gold still remains unpaid to your orator although the said note is long since overdue and there has been a default in the payment of the same, and that by reason thereof the said mortgaged property has become forfeited subject however to redemption in this Court of Equity by the defendant.

Your orator further represents that the said defendants Magdalena de la Cruz Cabrera y Pruna and Banco Territorial y Agricola de

Puerto Rico, have or claim to have some right, title or interest in or to the said mortgaged premises or some part thereof, but your orator alleges that all said claims or right if any such they have were acquired subsequent to the giving to your orator of the mortgage hereinbefore described and with full and sufficient notice of the existence of said mortgage and therefore that such alleged claims are each and all subject to the lien of your orator hereinbefore described by virtue of its mortgage aforesaid.

6 In consideration whereof and inasmuch as your orator can have no adequate relief in the premises except in this Court of Equity and to the end that the above named defendants Maria de las Nieves Cabrera y Pruna, Magdalena de la Cruz Cabrera y Pruna, Banco Territorial y Agricola de Puerto Rico may appear before this Honorable Court and answer your orator's bill of complaint according to the rules and practice of this Court but not under oath, their answers under oath being hereby expressly waived, that the amount due to your orator for principal and interest upon said promissory note may be ascertained and fixed by the decree of this Honorable Court.

And that in default of the payment of the same within a short day to be named by the Court the usual decree may be made for the sale of the mortgaged premises aforesaid to satisfy the amount so found to be due together with your orator's attorney's fees, expenses and costs of this suit, and that the said defendants and all persons claiming by, through or under them subsequent to the beginning of this suit and all other persons having any liens upon said mortgaged premises subsequent to the mortgage of your orator either as purchasers, incumbrancers or otherwise, may be barred and foreclosed of all equity of redemption in or to the said premises or any part thereof, and that your orator may have such other and further relief as the circumstances of the case may require and as the Court may deem proper and agreeable to the equity.

May it Please Your Honor to grant unto your orator the right of subpœna in chancery directed against the said Maria de las Nieves Cabrera Pruna, Magdalena de la Cruz Cabrera y Pruna, Banco Territorial y Agricola de Puerto Rico directing them and each of them to be and appear before this Honorable Court on a day certain therein to be named and under a certain penalty therein to be expressed then and there to answer the premises and to abide by and perform such decree as may be herein ordered, and your orator will ever pray.

PETTINGILL AND KEEDY,
Solicitors for Compl't.

7 (Mortgage referred to in the Bill of Complaint and attached thereto marked "Exhibit A" is set out in full in the Statement of fact filed by the Court June 27, 1907, and appears on page 52 of this record.)

Appearance.

(Filed Jan. 6, 1902.)

THE AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES CABRERA Y PRUNA ET AL.

To the Clerk:

You will please enter the appearance of Defendants, María de las Nieves Cabrera y Pruna and Magdalena de la Cruz Cabrera y Pruna and my appearance for them as their Solicitor in the above entitled cause.

F. H. DEXTER,
Solicitor for Defendants Above Named.

Stipulation.

(Filed Feb. 3, 1902.)

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

It is agreed between the parties hereto American Colonial Bank and María de las Nieves and Magdalena de la Cruz, that the foregoing defendants shall have until Thursday, February 6th, 1902, to file their plea or answer or other appropriate pleading herein.

8 PETTINGILL & KEEDY,
Sols. for Comp'lt.
F. H. DEXTER,
Attorney for María de las Nieves and Magdalena de la Cruz.

Answer and Disclaimer of the Banco Territorial y Agricola of Puerto Rico.

(Filed Feb. 5, 1902.)

THE AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES CABRERA Y PRUNA ET AL.

The answer and disclaimer of the Banco Territorial y Agricola de Puerto Rico, one of the above named defendants to the bill of complaint of the above named plaintiff.

In answer to the said bill the Banco Territorial y Agricola de Puerto Rico says as follows:

That it has not, and does not claim, and never has had nor has it

ever claimed to have, any right or interest in any of the matters in question in this suit, superior or anterior to the rights or interest which the above named plaintiff may have in such matters, and said Banco Territorial y Agricola disclaims all right, title and interest, legal and equitable in any of the said matters, superior or anterior to the right or interest which the above named plaintiff may have in or to the same; and said defendant further says that if it had been applied to by the plaintiff before the filing of the bill herein, it, the said defendant, should have disclaimed all such right, title, and interest, superior or anterior to the right, title and interest of the plaintiff; and it submits that the bill should be dismissed as against
9 the said defendant with costs.

BANCO TERRITORIAL Y AGRICOLA,
El Director Gerente, Vicenti Antonetti.
W. VINCENT ROBBINS, *Attorney for Def't.*

Answer of María de las Nieves.

(Filed Feb. 6, 1902.)

THE AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES CABRERA ET AL.

This defendant, María de las Nieves Cabrera y Pruna, now and at all times hereafter saving to herself all and all manner of benefit of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for her to make answer to, answering says:

Defendant says that as to the alleged mortgage described in the bill of complaint herein she has no knowledge of the same, and if the same was executed by her it was done on the false and fraudulent representation of Manuel Suarez and Ramón Suarez, for whom the said note was signed and without knowledge on her part, but with full knowledge thereof by complainant through its agent Eduardo Costa y Gomez.

Defendant says that notwithstanding the premises the said Manuel and Ramón Suarez, and the said Sucesion de J. M. Suarez y Cia. have paid to complainant bank, from time to time, and the said complainant bank has received, various sums of money, as-
10 signments and other considerations in payment of the said note without the knowledge of defendants, and the various amounts of which are unknown, but defendant avers that the same were sufficient to fully pay off and discharge the said indebtedness, and defendant avers and charges it to be a fact that after the execution of the said note and without the consent of defendant, complainant bank extended the time of payment of the said note, and the terms and manner of payment thereof upon various dates, and under such circumstances of which exact character are not known

to defendant. By reason of all of which defendant is prejudiced and released from all liability.

Defendant further states that on the 13th day of March, 1901, complainant bank, upon said date or shortly before that time, received from the said J. M. Suarez y Cia. and the said Manuel and Ramón Suarez, a bill of sale of a large amount of merchandise in full payment and consideration of the said indebtedness of eight thousand pesos, and upon the said 13th day of March, 1901, before Santiago Palmer, Notary Public in the city of San Juan, Porto Rico, said complainant bank, by public document received the said merchandise in such payment and full satisfaction of said note and gave its receipt therefor to the said Sucesores de J. M. Suarez y Cia. and the said Manuel and Ramón Suarez.

Defendant denies that she transferred and conveyed to co-defendant Magdalena de la Cruz Cabrera y Pruna the property obtained by defendant from her mother, as set forth in the said bill of complaint, for the purpose of depriving complainant of the benefit of any security which it might have in said property, but defendant avers that the said sale and transfer was made in good faith and for a full and valuable consideration, and because at the date of the said transfer defendant owed nothing to complainant bank
11 upon or on account of the indebtedness and mortgage hereinbefore described and because complainant had no interest in and to the property so transferred by her, *the* aforesaid, to the said Magdalena de la Cruz Cabrera y Pruna.

Wherefore, this defendant, having fully answered, confessed, traversed, and avoided or denied all the matters in the said bill of complaint material to be answered, humbly prays this honorable Court to enter its decree that the said note has been satisfied and cancelling the said mortgage, and that this defendant be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief as to this honorable Court may seem meet and equitable.

MARÍA DE LAS NIEVES CABRERA.
F. H. DEXTER, *Solicitor.*

Answer of Magdelina de la Cruz Cabrera y Pruna.

(Filed Feb. 6, 1902.)

THE AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

This defendant, Magdelina de la Cruz Cabrera y Pruna, now and at all times saving to herself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for her to answer, answering says:

12 That she denies that she received or accepted without consideration from co-defendant, María de las Nieves Cabrera y Pruna, a conveyance and transfer of the property and interest acquired by the said María de las Nieves through inheritance from her mother, as set forth in the bill of complaint, for the purpose of depriving complainant of the benefit of any alleged security claimed by it in the said property; and defendant denies that she had knowledge of any rights or claims in and to said property or inheritance upon the part of complainant.

But defendant avers that she bought the said property and inheritance from the said María de las Nieves in good faith and without knowledge of any claims of complainant and that the consideration therefor was for large sums of money before and at that time advanced to the said María de las Nieves and for various charges and indebtednesses before that time incurred by the said María de las Nieves on account of services rendered and moneys paid by defendant for the benefit of the said María de las Nieves, and her children. And upon the date mentioned in the bill of complaint herein defendant purchased the same in good faith as hereinbefore set forth and for a consideration without knowledge or notice of any pretended claim of complainant to the same.

And defendant says that she entered into the possession of the same and enjoyed the use thereof with the knowledge and consent of complainant and without objection from it.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith she is, by the said bill charged; without this, *there is* any other matter, cause or thing, in said complainant's said bill of complaint contained material or necessary for this defendant to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and
13 avoided or denied, is true, to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct; and humbly prays to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

MAGDALENA CABRERA.
F. H. DEXTER, *Solicitor.*

Joint Motion of Defendants, María de las Nieves and Magdalina de Cabrera, to Dismiss the Bill of Complaint for Failure to File Replication.

(Filed March 11, 1902.)

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

Now come defendants, María de las Nieves and Magdalina de Cabrera and jointly and separately move for an order dismissing

the bill of complaint herein for the reason that no replication has been filed as required by law and the rules of practice.

F. H. DEXTER,
Solicitor for said Defendants.

14 *Replication.*

(Filed March 15, 1905.)

AMERICAN COLONIAL BANK
vs.
MARIA DE LAS NIEVES CABRERA ET AL.

Foreclosure of Mortgage.

The complainant, the American Colonial Bank, saving and reserving unto itself all and all manner of advantage of exception which may be had or taken to the manifold uncertainties and insufficiencies of the answers of the several defendants herein, for replication to said several answers says that it will aver and prove its said bill to be true, certain and sufficient in law to be answered unto, and that said answers of said several defendants are untrue and insufficient to be replied unto by this repliant; without this, that *there is* any other matter or thing whatsoever in said answers contained material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

N. B. K. PETTINGILL,
Solicitor for Complainant.

15 *Journal Entry.*

(April 1, 1905.)

In Equity. No. 142.

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES CABRERA ET AL.

Now comes William H. Hawkins and files a motion to fix his fees as Special Master on the exceptions to the answers in this cause, and the same are allowed as against the defendants, the amount of said fees to be fixed by a later order of Court.

Thereupon the taking of oral testimony before the Court on a final hearing of this cause is begun, and, not being able to complete the taking of said testimony, the further hearing thereof is continued until Thursday, April 6, 1905.

Journal Entry.

(June 12, 1905.)

In Equity. No. 142.

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

Now comes the plaintiff herein by its solicitor N. B. K. Pettingill, and files a motion for an extension of time to complete the taking of testimony herein, and for the appointment of a Master to take said testimony. Whereupon said case is postponed until December 1, 1905.

16 *Motion.*

(Filed June 12, 1905.)

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES CABRERA Y PRUNA ET AL.

Bill to Foreclose Mortgage.

Now comes the complainant, by its solicitor N. B. K. Pettingill, and represents to the Court that its replication to the answers of defendants, whereby said cause was brought to an issue, was filed on the 15th day of March, A. D. 1905; that on the 15th day of March, 1905, an order was made by this court for the taking of the testimony of the respective parties herein orally before the Judge of this court, and the taking of the same was begun soon thereafter, but not completed on account of lack of time when said Judge could hear the same; and that the three months allowed under the rules of equity practice for the taking of evidence herein will expire on the 15th day of June current.

Your petitioner further represents that one witness for the complainant is now beyond the jurisdiction of this court, to wit: in the island of Santo Domingo, and it will be necessary to take the evidence of said witness under a *dedimus potestatem*, or other form of commission, and that there will be no further opportunity to take further testimony orally before the Judge of this court prior to his departure from the District on the 20th of the present month, and that said Judge does not expect to return to this District until the month of October next.

Wherefore complainant prays that the time for taking evidence in this cause may be extended until the 15th day of August
17 next, or such other time as may be fixed by the Court, and that a Master in Chancery may be appointed, to whom may be referred the testimony already taken before the Judge of this

court, and who may be empowered to take all further evidence to be taken by either of the parties within the time to be fixed by the order of this court herein prayed for, and to report to the court his conclusions of law and of fact therefrom within a short day after the closing of such evidence; and that such further orders may be made in the premises as equity may require.

THE AMERICAN COLONIAL BANK, *Complainant,*
By N. B. K. PETTINGILL, *Its Solicitor.*

UNITED STATES OF AMERICA,
District of Porto Rico:

N. B. K. Pettingill, being duly sworn, says that he is counsel of record for the complainant, and that the matters and things set forth are true to the best of his knowledge, information and belief.

N. B. K. PETTINGILL.

Sworn to and subscribed before me this 12th day of June, A. D. 1905.

EDW. GRINDROD,
Deputy Clerk, U. S. Dist. Court.

18 *Journal Entry.*

(Nov. 26, 1906.)

In Equity. No. 142.

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

Set for December 4, 1906, to complete the taking of testimony before the Court.

Journal Entry.

(Dec. 4, 1906.)

In Equity. No. 142.

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

This cause being called in accordance with a former setting herein for the taking of further testimony, appears F. H. Dexter, solicitor for the defendants, and announced ready to proceed; whereupon comes H. P. Leake of the firm of Pettingill & Leake, and requests a postponement on account of the absence from the District of N. B. K. Pettingill, solicitor for the complainant. The defendants by their said solicitor F. H. Dexter consent to such postponement subject to call for a resetting at a later date.

Journal Entry.

(Jan. 28, 1907.)

In Equity. No. 142.

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

Set for completion of testimony before the Court on Wednesday the 6th proximo.

19 *Journal Entry.*

(Feb. 5, 1907.)

In Equity. No. 142.

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

This cause having been set down for the completion of testimony before the Court on the 6th instant, it is now, by consent of counsel, continued for recall on the 25th instant for another setting.

Journal Entry.

(Feb. 25, 1907.)

In Equity. No. 142.

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

Set for the completion of the taking of testimony on the 1st proximo.

Journal Entry.

(March 1, 1907.)

In Equity. No. 142.

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

The Court hears the conclusion of the testimony herein, and the case is submitted for final decree, briefs to be filed by the 15th instant.

20 *Journal Entry.*

(May 3, 1907.)

In Equity. No. 142.

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES ET AL.

The Court hands down an opinion herein deciding the issues in this cause in favor of the complainant, and directs that a decree be prepared in accordance therewith.

21 *Opinion. Filed May 3, 1907.*

In the District Court of the United States for Porto Rico.
No. 142. Equity.

AMERICAN COLONIAL BANK, Complainant,
vs.
MARIA DE LAS NIEVES CABRERA Y PRUNA, MAGDALENA DE LA CRUZ and The BANCO TERRITORIAL Y AGRICOLA DE PUERTO RICO, Respondents.

Opinion on Merits.

This is an ordinary bill in equity brought to foreclose a mortgage. It was filed as long ago as December 17, 1901, and is one of the old cases which the present incumbent of the bench finds still undisposed of. The respondent Banco Territorial y Agricola de Puerto Rico, at an early date in the controversy, disclaimed any right in the premises against complainant, and the cause thereafter proceeded against the remaining two respondents.

Many motions and exceptions which, as the Court believes, were of a frivolous and useless character, were filed in the cause, and some of the same were referred to a master for taking of proofs, and for legal recommendations to the Court as to the disposition thereof. At last in the early part of the year 1905, an issue was raised, and thereafter at two or three different times, evidence was taken before the Court, the last taking being before the present incumbent of the bench, March 1, 1907. The stenographic notes of the evidence thus taken were all transcribed and filed. Thereafter, counsel for the respective parties filed briefs and the matter is now before
22 us for final disposition and decree.

A statement of the case is as follows: For some time,—and it does not appear for how long—previous to the early part of the year 1900, a man by the name of José Mariá Suarez carried on a mercantile, dry goods and notion business here at San Juan, Porto Rico. Shortly before that date he died, and two of his brothers,

Ramon Suarez and Manuel Suarez, together with his widow, the respondent Mariá de las Nieves Cabrera y Pruna, continued the business under a partnership organized in the early part of 1900 under the firm name and title of "Sucesores de J. M. Suarez y Cia." His widow testified that she became a silent partner in the concern because her husband had originally bought the store with her private funds and her husband or said business owed her at his death eight thousand pesos, and she took an interest to that extent in the conducting of the business thereafter with these two brothers-in-law of hers, but took no part in the management generally.

It seems that the concern needed money about that time and on said 21st day of February, 1900, it borrowed from the complainant bank the sum of eight thousand pesos, equivalent to four thousand eight hundred dollars in American money, and gave its six months nine per cent. promissory note therefor, signed by the respondent widow, Mariá de las Nieves, by and for herself individually, and also by one of the men of the firm for, and with the firm name, "Sucesores de J. M. Suarez y Cia." At the time of borrowing this money, and in order to obtain it, and without which it could not have been obtained, and in order to secure this note, the
23 concern gave to the complainant bank a mortgage on a house and lot in this city of San Juan, signed by the said respondent, Mariá de las Nieves, and also a mortgage or lien upon all and every real and personal right which might belong to the said Mariá de las Nieves as heir or legatee, or which might come to her from the estate of her deceased mother, the late Mrs. Nieves Pruna y Van Rosi, that had not yet been set off to her. This mortgage was at once recorded in the Registry Office. It seems also from the phraseology of the note, which is a long and verbose instrument, that this mercantile partnership concern of Sucesores de J. M. Suarez y Cia. was to continue depositing its money thereafter with the complainant bank, and that the bank should have a lien thereon for any other incidental indebtedness the concern might owe it.

One day before the note in question became due, that is, on the 20th day of August, 1900, the said respondent Mariá de las Nieves and the said firm of Sucesores de J. M. Suarez y Cia., over their own signatures, signed by each of them respectively, the widow for herself, and one of her brothers-in-law for the firm, wrote a joint letter to the bank asking an extension of the same, a translation of which letter is as follows:

* * * "Our note for 8,000 pesos, provincial currency, in favor of your bank falls due on the 21st of this month and we earnestly pray you to extend that obligation not only today but in the future, allowing us those extensions for periods of six months with interest. At the same time we promise to make payments after the second extension, until the amount shall be paid up. In the assurance that this favor will be granted, and awaiting your courteous reply, we remain.

Yours respectfully,
(Sgd.) NIEVES C. V. DE SUAREZ,
(Sgd.) SUC. DE J. M. SUAREZ Y CIA."

It seems that the extension thus requested, was not formally
24 granted, but the matter was permitted to drag along as it stood.

It further appears that along in the early part of the year 1901, this business concern became, or perhaps had been for some time embarassed, and they sent to the complainant bank and talked with its Mr. Arnold with whom they had done business, and told him they were liable to be attached out of existence in a short time by some insistent creditors, and begged him to aid them in some way to keep on as a 'going' concern with a view to paying their debts, including this bank. They suggested the execution of some sort of instrument in the nature of a chattel mortgage, as understood by Arnold, in favor of the bank of the whole or a portion of their stock of goods; he sent them to his lawyers, Messrs. Pettingill & Keedy, with a view to having such an instrument prepared. The lawyers sent one of their law clerks with these Messrs. Suarez to a notary by the name of Palmer, which official only it appears, under the law, could draw such an instrument, and who was accustomed to doing such work for the bank. The latter informed them that no such instrument as a chattel mortgage was then known to the laws of Porto Rico, and suggested instead the making of a bill of sale outright of the goods to the bank, and that the firm could remain in possession and continue the management and make payments as they saw fit. An instrument of that kind, under date of March 13, 1901, to carry out that intention was then prepared by the notary and afterwards executed by the parties,—the said Messrs. Suarez acting for the mercantile society, Suc. de J. M. Suarez y Cia., and the said Edwin L. Arnold acting for the bank.

Mr. Arnold, the cashier of the bank, states in substance
25 that when this instrument was prepared in 1901 his recollection is that he went to the notary's office and signed it without having much of an idea what it contained, and when on the stand during the recent hearing, he seemed to be somewhat surprised at its exact phraseology, when some of it was read to him. He said in connection with it, that when he signed it he had no idea of giving up the mortgage security which the bank held as security for its debt, and on the strength of which the loan was made, and that the firm just asked him to take their stock as additional security for the purpose of protecting them against action of other creditors, which would close up the business and prevent the bank from collecting its claim against them and prevent them from going on with their affairs. That he did not request the instrument and took little or no interest in it. That he had consulted his lawyers when the firm proposed it to him, and asked his lawyers to arrange the matter in such a way as not to affect the original loan or its security, and that written instructions were given to the notary that no change should be made in the status of the original loan, or its security, and that when the chattel mortgage was proposed, the notary said no such instrument was known in Porto Rico, but that he could arrange a document in which the security would be all right. That there was no agreement or understanding of any kind or character whatsoever between the parties that the making of this instrument should be considered as full payment of the main loan or debt. That he

never saw their stock of goods or any part of it or went to their store. That they remained in possession of it. That he had never
26 taken a chattel mortgage on a stock of goods in his life and didn't know anything about such proceedings. That he took it merely at their request to protect them and keep them going and that he surely would not have signed a document to release a note and take a stock of goods as a substitute for a real estate mortgage which he already had, and on the strength of which only the bank made the loan. That if he did such a thing he would expect to lose his job the next minute.

This bill of sale of this stock of goods is made by this concern Sucessores de J. M. Suarez y Cia. as an entity and not by the two men partners for themselves alone, to Mr. Arnold himself, but the wording of it shows that it is intended to be to, or for the benefit of the complainant bank.

Both of these remaining women respondents by their counsel now insist that this instrument amounts to a complete payment and release of the mortgage which this suit is brought to foreclose. We think therefore it is best to here set out a translation of its salient parts, and we do so as follows:

"Appear As party of the first part, The Mercantile Society Limited, doing business under the firm name and style of Sucesores de J. M. Suarez y Cia., owner of the establishment the "Bazar Europa" at number thirty-eight Fortaleza Street of this city, represented by its managing and active partners Don Manuel and Ramon Suarez y Cordero, of lawful age, bachelors, merchants and residents of this city, as it appears from the deed under which the said society was formed, under date of February sixth, nineteen hundred, executed before the notary Mauricio Guerra Mondrajon y Mejiás, recorded on page one hundred and thirty-eight of volume thirteen relative to partnerships, page number eight hundred and seventy-eight, registration first. And as party of the second part, Mr. Edwin L. Arnold, of lawful age, married and cashier of the American Colonial Bank of Porto Rico, and resident of this city.

Having in my judgment the legal capacity necessary, without any limitation whatsoever, to execute this deed of sale of dry goods, and state:

27 First. The Society Sucesores de J. M. Suarez y Cia. now is debtor to the American Colonial Bank of Porto Rico, in the sum of four thousand eight hundred dollars, due on the 21st of August last, according to the promissory note which they executed and not being able to deliver the amount thereof, have offered to make payment thereof in mercantile stock, according to the detailed inventory which they exhibit, subscribed by the society and which they take with them bearing my signature and seal and to which the creditor bank has manifested its conformity.

Second. That carrying into effect the sale of the goods set forth in the inventory exhibited, Messrs. Suarez y Cordero, in the representation in which they act, transfer all of the said effects set forth in the said inventory to the creditor bank for the sum of four thousand eight hundred dollars, leaving the same in the possesion of the bank,

in payment of the said amount of the promissory note above mentioned.

Third. Mr. Edwin L. Arnold accepts this deed; receives the inventory above mentioned and in consequence thereof, says that he leaves in the said establishment of the sellers, the "Bazar Europa," all the stock and goods which such persons have sold to him, in payment of the four thousand eight hundred dollars which they owe to the American Colonial Bank, in order that, for the account and commission of the latter, they may proceed to realize from the said goods, prices not to be less than those fixed in the inventory, and they are obliged to present to the bank weekly accounts of the sales they may make, together with the value in cash thereof, until the complete realization of the same takes place.

It is so executed by Messrs. Manuel and Ramon Suarez y Cordero and Mr. Edwin L. Arnold, before me and in the presence of the witnesses Don Joaquin M. Torres and Don Geronimo Carreras. * * *"

It may be well to note here that this bill of sale does not appear to have ever been recorded in the local registry office, or that any possession of the stock of goods mentioned in it was ever personally delivered to, or taken under it by the bank, unless the terms of the instrument itself constructively amount to such delivery and possession. Neither does it appear in evidence anywhere that anybody ever knew about this bill of sale, except the parties themselves, the immediate witnesses, and the notary, or that any person was ever deceived by it in any manner, or extended credit to, or refrained from enforcing their claims against the mercantile firm on account of it, or that anyone in fact lost any money because of it. But the fact does appear that the entire stock of the concern shortly thereafter went into the hands of their trustee in the bankruptcy proceedings which settled up their estate, and was used to pay their entire creditors pro rata, this complainant refraining from proving any claim against the bankrupt estate,—apparently relying entirely upon the security of its mortgage.

28

It does appear, however, that this mercantile concern continued to do business for several months thereafter, and during that time made small weekly payments into the bank, which on account of their smallness were kept in a separate account to the credit of Mr. Arnold himself as trustee or some such designated capacity, and against which, small amounts due the bank from the concern were from time to time charged. It appears that, in all, there was paid into the bank in this manner about fifteen hundred dollars, which, less the charge against it, left a credit of seven hundred and sixty dollars against the note of the main loan. It also appears that the interest on the principal note had been paid up to the date it was due, August 1, 1900.

It will be remembered that the mortgage given to secure the note, was executed on the 21st day of February, 1900, and that it covered a house and lot in the city of San Juan and whatever interest the said respondent Maria de las Nieves might then or thereafter be entitled to in the estate of her deceased mother,—and we find from an

exhibit introduced (C for complainant) and from the proofs,
29 that a few months thereafter, on July 15th, a voluntary partition of the mother's estate was had between the heirs, and certain interests, as in the exhibit set forth, in certain houses described, therein, situated in said city of San Juan, were set apart to the respondent Maria de las Nieves in her own right, the entire appraisement of which interests was at that date fixed at $5,769.84.

But it transpires that notwithstanding the said respondent Maria de las Nieves had written the bank on August 20, 1900,—one day before the said eight thousand peso note was due, asking for an extension of it, that she on the 21st day of March, 1901, something over six months thereafter, and just one day before the making of this bill of sale of the stock of goods by the firm of Sucesores de J. M. Suarez y Cia., of which she herself was a member, she transferred or attempted to transfer all her right in and to the house and lot mentioned in the original mortgage and all her right and interest in and to the interests last aforesaid which she acquired in her mother's estate, to her sister Magdalena de la Cruz, and this is why it became necessary for complainant to make the latter a party respondent to the bill, which alleges that the said Magdalena took the same with full knowledge of all the rights of the complainant and without paying any consideration therefor.

It appears from the evidence that a Mr. Todd who was a law student in the office of Messrs. Pettingill & Keedy, attorneys for the complainant bank at the time, went to the house where these two lady respondents lived, with a letter from the firm regarding the debt, which was intended to remind them,—or at least the said Maria—of the lien of this mortgage upon all of this property, including that received from the mother's estate, and in his
30 testimony, Mr. Todd says he saw and talked to both of them, and that the said Magdalena told him she had not yet consummated the trade. It is manifest that this statement was true, because under date of March 11, 1901, two days before the date of the transfer to her, the said Magdalena wrote a letter to Messrs. Pettingill & Keedy in answer to the letter their law clerk had thus brought her, which is Exhibit D for complainant, and a translation of it is as follows:

SAN JUAN, PTO. RICO, *March* 11, 1901.

Messrs. Pettingill & Keedy, City.

DEAR SIR: I have received your attentive letter of the 9th instant, and I am sorry I have to say to you in reply that you have been misinformed, since the property you refer to was acquired by me on the 2nd instant, free from all liens and mortgage, with the exception of the annuities (censos) mentioned in the deed of sale.

Neither the lady who sold to me nor myself had the least knowledge of the mortgage you speak of, to secure the payment of $4,800.00 and interest. I would mention, however, that the same day your letter was received, or the day before, we heard the rumor that those liens and obligations that you mentioned, existed, but they

cannot in any way affect me, the more so since there is no record in the Registry Office where I sent for information.

Both by what you have written to me and by what has been said to me by the lady from whom I purchased, I can see that not only she but you have been made the victim of deceit, to which I am not a party at all. However, as far as it lies within my power, and without prejudice to my rights, I am willing to facilitate you in the exercise of your own rights, as well as those of the seller; I mean the rights and interests of the American Colonial Bank, which you represent.

I am, Sirs,

Yours respectfully,

(Signed) MAGDALENA CABRERA.

From an examination of the original mortgage we find that it was recorded on March 15, 1900, and therefore the statement of the said Magdalena in her aforesaid letter that there was no record in the registry office of said mortgage, is manifestly a misstatement of
31 the fact, but independent of that we feel that it has been duly proved, and we so find, that she took all of the said property and the interests therein from her said sister probably without any consideration, and in any event she took it with full knowledge of, and subject to the right of this complainant.

Counsel for respondents made many statements as to the large value of the stock of goods mentioned in the said bill of sale, and made several statements in the record as to the negligence of the complainant bank in not following it up, and realizing upon it, all of which resulted, as he states, in the great injury and damage of his clients, etc. In this behalf it must not be forgotten that the possession of the stock or part of the stock of goods mentioned in the bill of sale was as much the possession of the said Maria de las Nieves as of the other partners, and it was as much her duty as theirs to realize from it and pay the debt. Her counsel introduced in evidence the entire record in the bankruptcy proceedings, which is a very large one, of the said firm of Sucesores de J. M. Suarez y Cia., from the files of this court, and we have gone to considerable trouble going through the same from beginning to end, and find that the said firm of which the said Maria de las Nieves was a member, although she was only a limited or special partner therein under its articles, filed its voluntary petition in bankruptcy on December 31, 1901, in this court, but because of her being such limited partner the petition itself sets out that she did not join therein; but it appears from one of the schedules that she or the estate of her husband was at the time indebted to said firm in the sum of $7,669.44. So, either individually or through being heir of her husband, she
32 must have in some manner gained benefit from the concern.

It appears from the schedules that the property which was put in that bill of sale to the bank was valued only at $1500.00, but whether this $1500.00 was its value as then left in the store, or the value that it had in the first place before these little payments into the bank, as above stated, were made, is not certain under the evi-

dence; and the best information we can get from the record leads us to believe that the goods described in said bill of sale were but a small fraction of the entire stock of the concern at the date the instrument was made. At any rate, every bit of it, as thus left over, went to the trustee to pay the general creditors, the bank not proving any claim whatsoever against the bankruptcy estate. In fact this so-called bill of sale appears to have been abandoned from the time it was executed, and no attention appears to have been paid to it throughout by anybody, until it was invoked as a defense in this suit.

The schedules in these bankruptcy proceedings show that this mercantile concern, in which the said Maria de las Nieves was a special partner, had been hopelessly insolvent probably long before the original loan was made, and its liabilities at the time of the failure were more than $25,000.00, four-fifths of which was actually proved up, but the assets were of such a worthless character and so much of the liabilities were preferred claims for taxes, rent, etc., as that when the whole estate was liquidated and sold out under due process of bankruptcy law, it realized only about $1800.00 and netted to the entire creditors only $330.00. The failure was apparently a gross and unmitigated fraud from beginning to end.

An examination of the pleadings in the case at bar shows that several untrue and untenable defenses to this bill were at first
33 attempted to be set up by each of these women respondents, all of which, save that sufficient to raise the present issues, were stricken out on exceptions being filed thereto and after elaborate hearings were had in the premises.

Counsel for said respondents confidently and vehemently insists that equity and good conscience require this court to hold that the said note and mortgage are paid and cancelled, and intimates that the complainant bank is not coming into court with clean hands, and for such reason deserves no consideration at the hands of a chancellor.

Whilst we are not commending the business acumen of a cashier of a bank, who will so carelessly sign such an instrument as this so-called bill of sale appears to be, still it appears that there was nothing in the laws of Porto Rico at the time to prevent a preference of creditors, if made more than four months before the actual filing of a petition in bankruptcy, and when we consider the equities of the case and balance them, we find that this respondent Maria de las Nieves was the cause of the loan being made. That the bank refused to make any loans save on security such as she as a member of the firm finally then offered, and we think it cannot be questioned that at that time she had, or ought to have had, complete knowledge of the embarrassed and insolvent condition of the firm of which she was then a member, and that as her partners had a right to make said so-called bill of sale for the firm, she was bound by it, and probably in truth and in fact had full knowledge of it, for she had previously written the bank for an extension of the loan; at any rate, she ought not now be permitted, under all the circumstances,
34 to deny liability, but should be held to be estopped in that regard. She, through her firm, received her share of the bor-

rowed money and the benefit of every dollar that came out of the goods mentioned in said so-called bill of sale, if any did so come, that was received by the complainant bank, and there are $760.00 still there, to be credited against the debt. In like manner, the balance of the goods went to pay the firm's debts, of which she was a member. Some of the unsworn pleadings on her part attempt to show that these brothers-in-law of hers deceived her concerning these matters, but even if this were true, which we are not deciding, we do not think that is any defense here. She was a joint-maker of the note and a joint-borrower of this money. She has not been misled or injured by this so-called bill of sale transaction, but in fact has been benefited, as it certainly contributed to reduce the debt against the security of which she happens to be the sole owner, and it would in our opinion be unconscionable to permit her to now deny her liability. The bank never aided her partners in deceiving or defrauding her, if they did so deceive or defraud her. The long delay in enforcing this matter is wholly due to her own persistent and dilatory pleading.

If this woman Maria de las Nieves was a mere outsider, or a mere surety in the ordinary sense, she would be entitled to more consideration, but for all that appears she may have benefited as much as anybody else from the money borrowed in the first place.

As to the other respondent, Magdalena, we think it has been clearly shown against her unsworn answer, that she took this property with full notice, and probably without value, and we
35 think the sale to her was simulated and intended to prevent complainant from subjecting the same to the payment of its debt.

Counsel for respondents has gone to considerable trouble in the preparation of a brief for our consideration, which would have great force were this respondent, Maria de las Nieves a mere surety or guarantor. On the contrary, she was a partner in the business and was herself the principal borrower of the money. The bank did not owe her the legal duties which are usually due from a payee to sureties or guarantors, and for this reason all of the authorities cited to us in her behalf we hold, under the facts and circumstances of this case, to be inapplicable. It is of course admitted as fundamental in law that any agreement between principal debtors and a payee, that is injurious to the interests of a surety, will in most cases discharge the latter; but we cannot see in the case at bar that anything save benefit to this woman at any time resulted from this bill of sale transaction, even if it should for the sake of argument be admitted that she was to any extent a surety in the true sense.

The rule against varying the terms of a written instrument by parole has, we think, no proper application to this case, because it has been fully proved that the facts concerning this so-called bill of sale were as above set out. In fact, these defendants do not claim or contend that the debt has been paid. They only insist that technically in law, because of the wording of this bill of sale, the lien as to the mortgaged property has been avoided, and that they have been released. It is well known that in a suit in equity, often a
36 receipt in full for a debt can be denied by parole, and the real facts shown. There is no getting away from the fact

that in this case the loan was made principally because of, and actually to this woman.

A case which we think shows how the Supreme Court of the United States deals with facts such as appear here, is that of Israel *v.* Gale, 174 U. S. 391,—where a Wall Street banker got one of his clerks to sign a note for him without paying the clerk anything for it, just to use it to overdraw on the bank, and notwithstanding that he was an officer in the bank and that his knowledge would ordinarily be the knowledge of the bank, the court held the clerk liable for the note thus discounted, when in fact the money left the bank because of that note.

Another instructive case, although not quite the same in substance, is that of Joyce *v.* Auten, 174 U. S. 591, where it was held that:

"There are many authorities sustaining the proposition that a surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee. * * * "

Instead of at any time after the making of this bill of sale, notifying the bank to give up her note and cancel the mortgage, which she now claims was complete payment, the respondent Maria de las Nieves, on the contrary, as shown by the proofs, made an effort to dispose of the property so as to prevent complainant from foreclosing on the same for the collection of its debt. As before stated, the possession of that stock of goods was as much her possession as it was that of her partners, and it was as much her duty to realize from it and pay the money on the debt as it was of the others. How
37 then would it be just to let her deny her liability for the debt?

The most that can be said for this so-called "bill of sale" is that it was given as additional security, because a chattel mortgage was prohibited under the local law, and hence of necessity the notary had to make the terms of the instrument absolute. That could not injure, but on the contrary by reducing the debt it helped the protesting respondent. We are therefore of opinion that this is one of the clear exceptions to the rule that oral testimony will not be received to vary the terms of a written contract. Some writers have well stated the proposition that to allow the form of a conveyance or other instrument to overcome the substance of the transaction, would often be to in fact effect a fraud. Babcock *v.* Wyman, 19 How. 289, and cases cited. See also Hughes *v.* Edwards, 9 Wheat. 488 and see Peugh *v.* Davis, 96 U. S. 332, where it is stated to be an established doctrine that a court of equity will treat a deed absolute in form, as a mortgage when it is executed for the loan of money; that the court looks beyond the terms of the instrument to the real transaction, etc. It cites many cases.

A case particularly in point because of possessing considerable analogy to the one at bar, is that of Morgan's Assignees *v.* Shinn, 15 Wall. 105. In that case certain part owners of a steamer called 'The Fairfax' filed a bill to force Shinn, who was the record owner of the remaining interest in the ship, to contribute his part for repairs which they had expended upon the vessel. Shinn set up that although the bill of sale to him of the interest he had in the ship was

absolute on its face, it was only intended as a mortgage. There was some evidence that the co-owners that were then suing Shinn,
38 really knew the whole transaction just as this Maria probably knew this whole transaction, and the Supreme Court of the United States held that Shinn was not liable for the repairs as he was only in reality a mortgagee out of possession. The bill in that case was not by third parties who furnished the supplies, and the bill here is not by creditors of the bankrupt mercantile firm. In that case it was brought for the joint owners. Here, as we see it, the joint debtor is trying to avoid liability because herself and her partners induced the complainant to sign this "bill of sale," containing this alleged absolute wording, and induced the creditor to receive some of the money from the sale of the goods in cancellation of a part of the debt. In our opinion, the equities are all with the complainant. It has proved all the material allegations of the bill. There are many situations in equity so plain, that it is not necessary to cite authorities to sustain the court in taking what is unquestionably the honest and proper position, and we think this is one of them.

For these reasons we hold that complainant is entitled to foreclose its mortgage as per its terms, for the balance due including fees and expenses, in whatever is the proper or usual way, against the property and against the respondents, but we hold that the seven hundred and sixty dollars must be credited on the note as of date August 21, 1901, and the interest calculated on the balance up to the time of this decision. Therefore a proper decree and all necessary orders in that behalf will be prepared and entered, and the cause is retained for all such necessary purposes.

B. S. RODEY, *Judge.*

39 *Decree.*

In the United States District Court for Porto Rico.

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES CABRERA Y PRUNA ET AL.

Foreclosure of Mortgage.

This cause having heretofore come on for hearing, upon application of the complainant for a final decree, upon bill, answers and testimony, and the court upon full consideration of the same having rendered its opinion and findings in favor of the complainant; therefore

It is hereby ordered, adjudged and decreed that the equity of this cause is with the complainant; that the defendant María de las Nieves Cabrera y Pruna is indebted to the complainant for principal and interest on the promissory note set out in the bill of complaint less the sum of $760.06 admitted by complainant to have been received for application as a part payment thereon, in the sum of Six

Thousand Four Hundred and Seventy-six and 52/100 dollars ($6,476.52), together with the additional sum of Six Hundred Dollars, the amount stipulated to be recovered for costs and attorney's fees in case of the foreclosure of the mortgage in said bill of complaint set forth; and that the said complainant, American Colonial Bank, do have and recover of and from said defendant María de las Nieves Cabrera y Pruna the sum of said two amounts, to wit: the sum of Seven Thousand and Seventy-six and 52/100 dollars ($7,076.52), together with interest thereon from this date until paid at the rate of six per cent. per annum.

It is further hereby ordered, adjudged and decreed that the interest in certain parcels of real estate inherited by said de-
40 fendant María de las Nieves Cabrera y Pruna from her mother as alleged in said bill of complaint and afterward set apart to her by the act of voluntary petition executed by said defendant and the other heirs on the 13th day of July, A. D. 1900, before the Notary Mauricio Guerra Mondragon y Mejias, is subject to the lien of the mortgage in said bill of complaint described, to the same extent as the other parcel of property specifically described therein; and that the attempted conveyance of said parcels of real estate so inherited by said defendant María de las Nieves Cabrera y Pruna to her co-defendant Magdalena de la Cruz Cabrera y Pruna is illegal and void as between said parties and said complainant; and that the same should be cancelled on the registry of property in so far as it affects the rights of said complainant under its mortgage aforesaid.

It is further hereby ordered, adjudged and decreed that the defendant María de las Nieves Cabrera y Pruna do forthwith pay to the complainant, American Colonial Bank, the said sum of money so found to be due as aforesaid, or that, in default thereof, the said mortgaged premises, being described as follows, to wit:

1. An urban property or one story house built of brick with flat roof, located at No. 75 Sol Street in the City of San Juan, bounded on its right entering by another house belonging to Pablo Corominas, on its left by another house belonging to Mrs. Asunción Poch, and on its rear by the backs of houses belonging to Ulises Alvarez Torres and Manuel Apellanis, said house having a measurement of 5 meters 70 centimeters front, and 30 meters 20 centimeters deep.

2. An undivided one-half interest in the two adjoining houses, situated on San Francisco Street, in the City of San Juan and designated as numbers 20 and 22, the first being a one-story house and the second having two stories, both made of brick and considered as one sole corner property, bounded on the right entering, which is east, of Doña María Nicolasa Lopez, and on the back or rear by the property of Pedro Orcasitas y Ortiz.

41 3. An undivided interest equivalent to a participation of the value of $1,518.36 upon a total valuation of $13,058 in the house situated on the same San Francisco Street and designated as Number 89, the same being a two story house of brick, bounded on the right entering by property which formerly belonged to Miguel Antonio Villanueva, now Manuel Cañal, on the left by property of Julian E. Blanco, and on the rear by that of Baldomero Hernandez.

4. An undivided interest equivalent to a participation of $601.81 upon a total valuation of $3,028.32 in the six-elevenths part of a two-story brick house, situated on the same San Francisco Street and designated as Number 37, bounded on the right entering by the property of Domingo Font, on the left by property of Enrique María Varas, now his heirs, and on the rear by property of Bernabe Chavarri.

5. An undivided interest equivalent to a participation of the value of $874.48 upon a total valuation of $2,523 in the house situated on Sol Street in said City of San Juan and designated as Number 81, being a one-story brick building, bounded on the right entering by property of the Sucesion Soler, on the left by that of Andrés Avalino David, and on the rear by property of Damian Esturio and of Manuel Lazaro.

or so much thereof as may be necessary and sufficient to realize the several amounts due complainant as aforesaid for principal, interest, expenses and attorney's fees, be sold as hereinafter directed by the Special Master in Chancery of this court at public auction to the highest and best bidder for cash to satisfy the several amounts herein decreed to be a lien thereon.

It is further hereby ordered, adjudged and decreed that H. S. Hubbard, U. S. Marshal for this District, be, and he is hereby, appointed Special Master in Chancery of this court to execute this decree by making said sale; that he give public notice of the time and place of said sale by previously publishing the same once each week for four successive weeks in a newspaper regularly published and having a general circulation in this District; that said sale be made at the door of the Court House of this court in the city of San Juan aforesaid; that said parcels of property be sold separately; and that said Special Master do make a report to this court of his doings in the premises with all convenient speed, in case the debt of the complainant is not forthwith satisfied and such sale rendered unnecessary.

42 It is further hereby ordered, adjudged and decreed that the parties to this cause, or any of them, may become purchasers at such sale; and that, upon said sale being made, the said defendants María de las Nieves Cabrera y Pruna and Magdalena de la Cruz Cabrera y Pruna, and all persons claiming by, through or under them since the commencement of this suit, be forever barred and foreclosed of all right and equity of redemption in or to said mortgaged premises, or any part thereof; and that, in case the proceeds arising from said sale shall be insufficient to pay the amount so due to the complainant as aforesaid, after deducting the costs of making said sale, the Special Master shall in his report specify the amount of such deficiency and on the confirmation of such sale the complainant may upon application have such further decree in the premises as may be equitable.

And all other matters pending in said cause are hereby reserved until further order.

Done and ordered in open court at San Juan this 6th day of May, A. D. 1907. B. S. RODEY, *Judge.*

4—136

43 *Petition for Appeal.*

(Filed June 1, 1907.)

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES CABRERA ET AL.

Petition for Allowance of Appeal with Supersedeas.

The above-named Defendants conceiving themselves aggrieved by the order and decree made and entered in the above-entitled cause on the sixth day of May, 1907, wherein and whereby it was ordered, adjudged and decreed that the equity of this cause is with the Complainant and that the Defendant, Maria de las Nieves Cabrera y Pruna, shall pay the Complainant the sum of $7,076.52 and that a foreclosure shall be had of the property of the said Defendant described in the Bill of Complaint herein and in the said decree for the purpose of paying the said amount; and that the certain deed executed by the said Defendant, Maria de las Nieves Cabrera y Pruna, to Defendant Magdalena de la Cruz on the 13th day of July, 1900, be annulled and set aside—do hereby appeal from the said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of error filed herein, and they pray that favorable appeal may be allowed and that a transcript of the record, papers and proceedings upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

San Juan, Porto Rico, May 28, 1907.

F. H. DEXTER,
Solicitor for Defendants.

44 *Assignment of Errors.*

(Filed June 1st, 1907.)

AMERICAN COLONIAL BANK
vs.
AMARIA DE LAS NIEVES CABRERA ET AL.

Defendants filed the following Assignment of Errors, upon which they rely for a reversal of this cause:

(1) The action of the Court in entering the decree herein notwithstanding the release or receipt executed by Complainant in favor of the Sucesores de J. M. Suarez y Ca. on the 13th day of March, 1901, the said Sucesores de J. M. Suarez y Ca. being the principal debtor for whom Defendant Maria de las Nieves Cabrera y Pruna was a surety.

(2) The action of the Court in admitting parol-testimony of the witness Edwin L. Arnold, Cashier of the Complainant-Bank, to nullify and make ineffective the said release and receipt.

(3) The decree of the Court rendered herein is contrary to the evidence and to the equities of the case.

(4) The action of the Court in entering a decree in favor of Complainant subject to the mortgage of February 21, 1900, to properties which were subsequently awarded to Defendant, Maria de las Nieves Cabrera y Pruna, out of and from the inheritance in the estate of her deceased mother, which partition and assignment did not take place until after the said mortgage.

Wherefore, the said Defendants (Plaintiffs in Error herein) pray that the said decree be reversed.

F. H. DEXTER,
Attorney for Defendants.

45 *Order Allowing Appeal.*

(Filed June 1, 1907.)

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES CABRERA Y PRUNA, MAGDALENA DE LA CRUZ, and the BANCO TERRITORIAL Y AGRICOLA DE PUERTO RICO.

On this the 1st day of June, 1907, and at the April Term thereof, 1907, it being the same term at which the decree herein complained of was rendered, the defendants herein appear by their solicitor, Francis H. Dexter, and present their petition for an appeal from the decree rendered herein on the sixth day of May, 1907.

It is, therefore, ordered that an appeal to the Supreme Court of the United States from the final decree hereto filed and entered herein be, and the same hereby is, allowed, and that a certified transcript of the record and testimony, exhibits, stipulations, and all proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $1,000, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

B. S. RODEY, *Judge.*

46 *Bond on Appeal.*

(Filed June 11, 1907.)

AMERICAN COLONIAL BANK
vs.
MARIA DE LAS NIEVES CABRERA ET AL.

Bond on Appeal.

Know all men by these presents, that we, Maria de las Nieves Cabrera, as principal, and Magdalena de la Cruz and Francis H. Dexter, as sureties, are held and firmly bound unto the American

Colonial Bank in the full and just sum of $1,000.00 to be paid to the said American Colonial Bank, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of June, 1907.

Whereas, lately at a session of the District Court of the United States for Porto Rico, in a suit pending in the said Court between the American Colonial Bank, complainant, and Maria de las Nieves Cabrera, *et al.,* Defendants, a decree was rendered against the said Maria de las Nieves Cabrera, and the said Maria de las Neives Cabrera having obtained from said Court an order allowing an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, a citation directed to the said American Colonial Bank is about to be issued citing and admonishing it to be and appear at the Supreme Court of the United States.

Now, the condition of the above obligation is such that if
47 the said Maria de las Nieves Cabrera and the said Magdalena de la Cruz shall prosecute their said appeal to effect and shall pay all damages and costs that may be awarded against them if they fail to make good their plea, then this obligation to be void; otherwise to be and remain in full force and effect.

MARIA DE LAS NIEVES CABRERA.
MAGDALENA DE LA CRUZ CABRERA.
FRANCIS H. DEXTER.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Before me personally appeared Magdalena de la Cruz Cabrera and Francis H. Dexter sureties on the within bond, and being duly sworn upon their oath respectively state that they are each worth more than the amount of the said bond in property in Porto Rico over and above all exemptions.

MAGDALENA DE LA CRUZ CABRERA.
F. H. DEXTER.

Subscribed and sworn to before me this 11th day of June, 1907.

H. H. SCOVILLE,
Clerk of the Court.

Approved this 11th day of June, 1907.

B. S. RODEY, *Judge.*

48 *Præcipe for Transcript of Record for Purposes of Appeal.*

(Filed June 15, 1907.)

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NEIVES CABRERA ET AL.

H. H. Scoville, Esquire, Clerk of the District Court of the United States for Porto Rico, San Juan, Porto Rico:

DEAR SIR: Please prepare, for immediate transmission to the Clerk of the Supreme Court of the United States, the complete record of this case, for the purposes of appeal, which has been allowed herein.

San Juan, Porto Rico, June 14, 1907.

F. H. DEXTER,
Solicitor for Ap-ellants.

49 *Statement of Facts.*

(Filed June 27, 1907.)

AMERICAN COLONIAL BANK
vs.
MARÍA DE LAS NIEVES CABRERA Y PRUNA ET AL.

Statement of the Facts of the Case and the Rulings of the Court on the Admission of Evidence and Exceptions Thereto.

Statement of Facts.

(1) This suit is brought by the American Colonial Bank, a corporation organized under the laws of the State of West Virginia and having a place of business in the City of San Juan, Porto Rico, against María de las Nieves Cabrera y Pruna; Magdalena de la Cruz Cabrera y Pruna, and The Banco Territorial y Agricola, a corporation organized under the laws of the Kingdom of Spain and having a place of business in the City of San Juan, Island of Porto Rico, which last-named defendant subsequently disclaimed any interest in the action.

(2) Previous to the year 1900 José María Suarez carried on a mercantile business in San Juan, Porto Rico. Shortly before that date he died, and two of his brothers—to wit, Ramón Suarez and Manuel Suarez—together with his widow, the defendant, María de las Nieves Cabrera y Pruna, continued the business under a partnership organ-zed in the early part of 1900 under the firm name and style of "Sucesores de J. M. Suarez y Compañia."

The said widow became a silent partner in the concern,
50 because her husband had originally bought the store with her private funds, and her said husband, or the said business,

owed her at his death the sum of Eight Thousand (8,000) pesos, and she took the interest to that extent in the conduct of the business thereafter with her said brothers-in-law, but she took no part in the management generally.

(3) The concern being in need of money borrowed from the Complainant's Bank on the twenty-first day of February, 1900, the sum of Eight Thousand (8,000) pesos, equivalent to Forty-eight Hundred Dollars ($4,800) in U. S. Currency, at the legal rate of exchange, and gave its promissory note to the Bank therefor, payable in six (6) months, at nine (9) per cent. interest. Following is a copy of said note:

$8000.00 Pesos } Either on demand.
$4800.00 Dollars }

SAN JUAN, PORTO RICO, *February* 21, 1900.

Six months after date, for value received, we promise to pay to the American Colonial Bank of Porto Rico, at the office of the said Company, in the City of San Juan, Eight Thousand pesos M. C. or Forty-eight Hundred Dollars U. S. Cy., having deposited with said Company as collateral security for payment of this or any other liability or liabilities of ours to said Company, now existing, or which hereafter may be contracted, the following property, viz:

A cession of all the interests of the signers of this in the Estate of Nieves Pruna y Vanrosi, and a mortgage on house on Sol Street. This note can be renewed with the consent of the Cashier of the American Colonial Bank, without prejudice to the security or collateral, with full power and authority to said Company to sell, assign and deliver the whole, or any part thereof, or any sub-
51 stitutes therefor, or any additions thereto, at any Brokers' Board, or at any public or private sale, at the option of said Company, or its President, or Treasurer, or its or their or either of their assigns, on the non-performance of this promise, or the non-payment at maturity of any of the other liabilities aforesaid, or at any time or times thereafter, without demand of payment, advertisement or notice of sale, which are hereby expressly waived; and after deducting all costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale, or sales, to pay any or all of said liabilities to said Company, or its assigns, as its President or Treasurer, or assigns, shall deem proper, returning the overplus to the undersigned; and upon any sale at public auction or at Brokers' Board the holder thereof may purchase the whole or any part of such securities, discharged from any right of redemption. And the undersigned agrees to be and remain liable to the holder hereof for any deficiency.

The Company is hereby given a lien upon all moneys held by it on deposit or otherwise, to the credit of the undersigned, and is authorized at any time to appropriate all of said moneys to the payment of whatever may be due on this note, or any other obligations of the undersigned now existing or hereafter contracted, whether the same be then due or not due.

In case of depreciation in the market value of the security hereby pledged, or which may hereafter be pledged for this loan, a payment is to be made on account, so that the said market value shall always be at least — per cent. more than the amount unpaid of this Note. In case of failure to do so this Note shall be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the Company may immediately reimburse itself by
52 sale of the security as hereinbefore provided.

(Sgd.) MARIA DE LAS NIEVES DE SUAREZ.
(Sgd.) SUC. DE J. M. SUAREZ & CO.

(4) In order to obtain this money the brothers-in-law composing said firm of J. M. Suarez & Company induced defendant María de las Nieves to execute a mortgage upon the property belonging to her, or which might belong to her, from the estate of her deceased mother and which had not yet been divided.

(5) This mortgage was executed on the twenty-first day of February, 1900, and contained the following stipulations:

Number 94.

In the City of San Juan the Baptist, at Porto Rico, United States of America, on the twenty-first day of February, nineteen hundred, before me, Santigao R. Palmer, Notary of the College of Porto Rico, with residence and open office at Number 23 Fortaleza Street, this city; Appeared: as party of the first part, Mrs. María de las Nieves Cabrera y Pruna, of age, widow of Suarez, property-owner and resident of this City.—As party of the second part, the American Colonial Bank of Porto Rico, domiciled in this city and represented in this act by its Cashier, Mr. Edwin L. Arnold, of age, married, a merchant, and a resident herein.

The appearing parties have, in my judgment, the necessary legal capacity for the execution of this deed of mortgage bond, and state:

First. That on this date, the mercantile firm of this city Successors to J. M. Suarez & Company, (special copartnership) as direct debtors, and the party of the first part, as surety for the debtors and principal guarantor of the debtors, have executed and signed
53 to the order of the party of the second part, a promissory note for eight thousand pesos, current provincial money, with interest at the rate of nine per centum per year, payable in advance, for the term of six months, and for value received.

Second. That the surety of said obligation has offered to the creditor namely, the Bank, and the latter has accepted, to execute in its favor a first mortgage on a piece of property of her own, and to transfer to it certain inherited rights which she possesses; both to respond for the payment of the principal of said obligation, of its interests, expenses, costs and damages which may accrue to the creditor in case of judicial claim, in the form and under the conditions which the appearing parties are about to specify in the following clauses.

Mortgage.

1st. Mrs. María de las Nieves Cabrera y Pruna, in order to guarantee the payment of the eight thousand pesos, current provincial money, principal amount of the promissory note referred to in clause number one of this deed, of its interests in advance, at nine per centum per year, and in case of judicial claim, the expenses, costs and damages accrued to the creditor, up to the sum of one thousand pesos provincial money which she fixes for that purpose, she specially mortgages in favor of the American Colonial Bank of Porto Rico, the urban property, or one-story house, brick-built, with flat roof, located on number seventy five Sol Street, third municipal district of this city, bounded on its right, by another house belonging to Mr. Pablo Corominas, and on its rear, by the rear of houses belonging to Mr. Ulises Alvarez Torres and Mr. Manuel Apellanis;
54 said house has a measurement of five meters seventy centimeters frontage and thirty meters twenty centimeters depth.
She declares that this house has no liens whatever or responsibility; and she acquired and owns same by virtue of the following titles: By purchase made by her first husband, Mr. Ramón de Buega y Pezuela from Mr. Matias Ledesma y Salaña, as per deed executed in this city on the fifteenth of January, 1884, before the Notary Mr. Mauricio Guerra Mondragon y Mejias; and the will executed by the said Mr. Ramón de Buega y Pezuela before his death on the 2nd of March, 1889, before the Notary of the City of Santander, Spain, the attorney Manuel Alipio Lopez, appointing her his sole and only heir. These titles are recorded in the Registry of Property of this city, at folios 79 and 200, respectively, of volumes 3rd and 17th of same Municipality, property number 130, 7th and 8th inscriptions.

Appraisement.

2nd. In case of judicial claim and in accordance with Article 127 of the Mortgage Law, the appearing parties hereby appraise the property in the value of nine thousand pesos, provincial money, and hereby renounce to any new appraisement.

Cession.

3rd. The party of the first part, Mrs. María de las Nieves Cabrera y Pruna, states that she is one of the heirs of her legitimate mother Mrs. Nieves Pruna y Vanrosi, as per clause nine of the will which she executed in this city on the 24th of February, 1898, before the Notary Mr. Mauricio Guerra Mondragon y Mejias, as well as legatee of the third part of free disposition, and with the right of being bettered in the other third part of the properties of the testatrix, both together with her sisters Mrs. Josefa Mrs. Magdalena and Mrs.
55 Ana Cabrera y Pruna, as per clause fifth of the will above referred to.
And Mrs. María de las Nieves Cabrera y Pruna, grants: that all and every real and personal rights which may belong to her as

heir, as legatee, and as favored or bettered heir in the estate and properties of her deceased mother, Mrs. Nieves Pruna y Vanrosi, she cedes, renounces and transfers, without reservation, in favor of the American Colonial Bank of Porto Rico, placing same in her place, person, action and rights, with ample powers in order that, without the concurrence of said party of the first part, it may intervene and attend to all the acts of the will and testament of the mentioned Mrs. Nieves Pruna y Vanrosi; as to the appointment of appraisers; as to the liquidation, partition and adjudication of the inherited property, doing all of the acts and taking all the steps required or that the Bank may deem convenient; executing and signing the public and private documents necessary for the completion of the testamentary proceedings, the Bank taking possession for itself, of the properties which may be adjudicated to the ceding party. The object of the present transfer or cession is that if Mrs. María de las Nieves Cabrera y Pruna, should fail to pay the eight thousand pesos, provincial money, or interests, of the promissory note of which she is surety, because of its maturity, it should not have been paid by Successors of J. M. Suarez, the American Colonial Bank, then, without prejudice to the foreclosure of the mortgage which she has executed in its favor, may collect, from the value of the rights and properties corresponding to the ceding party according to the will of Mrs. Nieves Pruna y Vanrosi, the principal, interests, expenses, costs and damages which may have been adjudicated to her in full, or from the part assessed to her in payment thereof if the proceeds of the sale of the property mortgaged should not
50 be sufficient to cover the principal, interests and other expenses; and the American Colonial Bank may, at its pleasure, if the ceded rights should be sufficient to cover the total amount of its credit, it can pay itself with them, and if not, foreclose the mortgage, without waiving such personal actions as it may be entitled to take against the debtors and the surety of the said promissory note; but if the said note be paid at maturity, then the American Colonial Bank, in return shall cede back to Mrs. María de las Nieves Cabrera y Pruna the same rights herein ceded.

4th. All expenses incurred on account of the execution of this deed, the making of its first copy for the Bank, as well as for its registration, the cancellation of the mortgage and of the retrocession, if that should be the case, as well as the payment of all imposts and taxes which may be assessed on the mortgage, shall be on account of Mrs. María de las Nieves Cabrera y Pruna.

5th. Both appearing parties make the express reservation in favor of the State, the Province and of the Municipality, of the legal mortgage which has preference above any other creditors, for the collection of the last yearly tax assessed but not paid for account of the above-described property.

6th. The American Colonial Bank of Porto Rico, and in its name its Cashier Mr. Edwin L. Arnold, accepts the mortgage and its consequences, as well as the cession with its consequences, under all the circumstances set forth in this deed.

I, the Notary, hereby state that I advised the parties that as regards the mortgage the creditor is not out-titled to claim to the

prejudice of third parties, any more back rents than those cor-
57 responding to the last two years and the part due of the current year, not invalidating, however, whatever personal rights he may have against the debtors in order to claim from them back rents belonging to previous years, and to ask in such a case, for an extension of the mortgage. That if a copy of this document should not be recorded in the Registry of Property, as regards the mortgage contained therein, it shall not be admissible, with prejudice to third parties, in Tribunals, Councils or Offices of the Government; with the exception of the two cases referred to in Article 389 of the Mortgage Law.

It was thus executed by Mrs. María de las Nieves Cabrera y Pruna and Mr. Edwin L. Arnold, before me, being instrumental witnesses the citizens residents of this city, Mr. Geronimo Carreras and Mr. Arturo G. Vizcarrondo.

I read the present document to the executing parties and to the witnesses; I told them that they had the right to read same by themselves. Mr. Arnold presented as his interpreter, Mr. Edgar Da Costa Gomez, who read the same to him in the English language. And all having stated that they were well-informed of its contents, the executing parties ratified it in all its parts, signing together with the witnesses. I, the Notary, certify that I am acquainted with the executing parties, as well as of all the rest that I affirm or refer to herein, which I authorize on the four double sheets of paper of the Notarial College number 18,474, its two following and 18,420

MARIA DE LAS NIEVES,
V. de Suarez.
EDWIN L. ARNOLD, *Cashier.*
EDGAR DA COSTA COMES.
GERONIMO CARRERA.
ARTURO G. VIZCARRONDO.
(Marked and Signed) SANTIAGO R. PALMER.

This is a first true copy the original of which is to be found at Number 94 of my protocol-general of public instruments to which I refer to. In witness whereof, and at the request of the Bank,
58 creditor in this transaction, I issue these presents which I mark, sign and scroll on four double sheets of paper of the Notarial College number 18,456 and its three following numbers at Porto Rico, on the same date, month and year of its execution.

(Signed) SANTIAGO R. PALMER.

There is a Notarial Seal.

The aforesaid document has been recorded as to the mortgage mentioned within, at folio 202 of Volume 17 of the City, properly 130 duplicate 11th inscription; and the inscription as to the cession also mentioned therein, is denied, as no description is given of the property, rights and actions ceded, and therefore it cannot be ascertained whether or not they are recorded in favor of the party making

the cession; and this defect being such that it cannot be amended, the provisional inscription cannot be allowed.

San Juan, Porto Rico, Marzo 15 de 1900.

The Registrar:

(Signed) JOSÉ BENEDICTO.

There is the Seal of the Registrar of Property.

Dues: twelve pesos.

Num. 1 and 7 of Tariff.

This mortgage was duly recorded in the Registry of Property.

59 (6) Subsequent to the execution and registration of this mortgage upon the property at No. 75 Sol Street, in the City of San Juan, the testamentary proceedings relating to the estate of the deceased mother of Defendants were terminated and the determination was made of the interest of the Defendant, María de las Nieves, therein, and such interest was assigned to her by a division made as the result of the separation and distribution to her of an undivided interest in four (4) other properties in the City of San Juan, Porto Rico,—to wit:

(*a*) An undivided one-half (½) interest in the two adjoining houses situated on San Francisco Street and designated as Nos. 20 and 22.

(*b*) And undivided interest equivalent to a participation of the value of $1,518.36 upon a total valuation of $13,058.00 in the house situated on San Francisco Street and designated as No. 89.

(*c*) An undivided interest equivalent to a participation of $601.81 upon a total valuation of $3,028.32 in the six-elevenths (6/11) part of a brick house at No. 37 San Francisco Street.

(*d*) An undivided interest equivalent to a participation of the value of $874.48 upon a total valuation of $2,523.00 in the house at No. 81 Sol Street.

(7) On the twelfth day of March, 1901, Defendant, María de las Nieves Cabrera y Pruna, transferred, by deed, all of the above properties to Defendant, Magdalena de la Cruz Cabrera y Pruna.

(8) On the thirteenth day of March, 1901, there was executed the following document by and betwen the said firm of Sucesores
60 de J. M. Suarez y Compañia, upon the one part, and the American Colonial Bank, upon the other, before the Notary Santiago R. Palmer.

Number one hundred and forty-nine, in the City of San Juan, on March 13, Nineteen Hundred and One. Before me Santiago R. Palmer, Notary of the College of Porto Rico, and a resident of this City with abode on the first floor of the house marked with number Twenty-three on Fortaleza Street, corner of Cruz. Appear as Party of the first part, The Mercantile Society Limited, doing business under the firm name and style of Sucesores de J. M. Suarez y Cia., owner of the establishment the "Bazar Europa" on number Thirty-eight on Fortaleza Street of this City, represented by its managing and active partners Don Manuel and Ramón Suarez y Cordero, of lawful age, bachellors, merchants and residents of this city, as it appears from the deed under which the said society was formed,

under date of February six, One thousand Nine Hundred, executed before the Notary Mauricio Guerra Mondrajon y Mejias, recorded on page Hundred and Thirty-eight of Volume Sixteenth relative to partnerships page number Eight Hundred and Seventy-eight, registration first. And as Party of the second part, Mr. Edwin L. Arnold, of lawful age, married and Cashier of the American Colonial Bank of Porto Rico, and resident of this city. Having to my judgment the legal capacity necessary without any limitation whatsoever to execute this deed of sale of dry-goods, and state:

First. The Society Sucesores de J. M. Suarez y Cia., now is debtor to the American Colonial Bank of Porto Rico, in the sum of Four Thousand Eight Hundred Dollars, due on the 21st of August,
61 last, according to the promissory note which they executed, and not being able to deliver the amount thereof have offered to make payment thereof in mercantile stocks, according to the detailed inventory which they exhibit subscribed by the society and which they take with them bearing my signature and seal and to which the creditor bank has manifested its conformity.

Second. That carrying into effect the sale of the stocks set forth in the inventory exhibited, Messrs. Suarez y Cordero in the representation by which they act transfer all of the said effects set forth in the said inventory to the creditor bank for the sum of Four Thousand Eight Hundred Dollars, leaving the same in the possession of the bank, in payment of the said amount of the promissory note above mentioned.

Third. Mr. Edwin L. Arnold accepts this deed; receives the inventory above mentioned and in consequence thereof says, that he leaves in the said establishment of the sellers the "Bazar Europa" all the stock and goods which such persons have sold to him in payment for the four thousand eight hundred dollars which they owe to the American Colonial Bank, in order that, for the account and commission of the latter they proceed to realize from the said goods prices not to be less than those fixed in the inventory, and they are obliged to present to the Bank weekly account of sales they may make together with the value in cash thereof until the complete realization of the same takes place.

It is so executed by Messrs. Manuel and Ramón Suarez y Cordero and Mr. Edwin L. Arnold, before me and in the presence of the witnesses Don Joaquin M. Torres and Don Geronimo Carreras.

I read the foregoing deed to the parties executing same and
62 to the witnesses, advising them of the right they had to read it themselves, they found it correct, the contracting parties ratified it and signed it together with the aforesaid witnesses; of which and of the acquaintance of the parties as well as of the other provisions of the same executed in two sheets of paper, I, the Notary, certify.

RAMON SUAREZ CORDERO.
MANUEL SUAREZ CORDERO.
EDWIN L. ARNOLD, *Cashier.*

JOAQUIN M. TORRES.
GERONIMO CARRERAS.
(Signed) SANTIAGO R. PALMER.

On the date above mentioned I issued the first copy hereof for the use of the creditor bank, in two sheets of paper. I certify,

PALMER,

It is first copy, made from the original thereof filed in my general protocol, under number Hundred and Forty-nine; In testimony whereof, and by petition of Sucesores de J. M. Suarez y Cia., I issue this in two sheets of paper, at San Juan, Porto Rico, on the thirty-first day of December, Nineteen Hundred and One.

(Sgd.) SANTIAGO R. PALMER.

Internal Revenue Stamp for the value of Fifty Cents cancelled with the stamp of the Notary.

(9) From the testimony of Mr. Arnold, the Cashier, the Court finds that when this instrument was prepared, March 13, 1901, he went to the Notary's office and signed it without having much of an idea of what it contained, and when on the Stand, during the trial of the case, he seemed to be somewhat surprised at its exact phraseology when some of it was read to him; that when he signed it he had no idea of giving up the mortgage security which the Bank held as security for this debt and on the strength of which the loan was made, and that the firm just asked him to take their ad-
63 ditional stock as additional security for the purpose of protecting them against the action of other creditors, which would close up the business and prevent the Bank from collecting its claim against them, and also prevent them from going on with their affairs; that he did not request the instrument, and took little or no interest in it; that he had consulted lawyers when the firm proposed it to him and asked his lawyers to arrange the matter in such a way as not to affect the original loan or its security, and that written instructions were given through the Notary that no change should be made in the status of the original loan or its security; and that when the chattel-mortgage was proposed the Notary said that no such instrument was known in Porto Rico, but that he could arrange the document so that the security would be all right; that there was no agreement or understanding of any character whatsoever between the parties that the making of this instrument should be considered as full payment of the main loan or debt; that he never saw their stock of goods, or any part of it, or went to their store; that they remained in possession of it; that he took it merely at their request to protect them and keep them going, and that he surely would not have signed the document to release a note and take a stock of goods as a substitute for a real-estate mortgage which he already had and on the strength of which the Bank only made the loan.

(10) No charge is made by Complainant-Bank that either of the Defendants took any part in the execution of the said document of March 13, 1901, nor was any testimony offered charging, or attempting to charge, them or the partners of J. M. Suarez y Cia., with any fraudulent conduct in the execution of the said document.

64 (11) That after the making of the original loan by the Bank the said firm of J. M. Suarez & Company paid to the

latter small sums of money at various times amounting in the aggregate to about Fifteen Hundred Dollars ($1,500.00), a portion of which was received after the execution of the said document of March 13, 1901, and which was undoubtedly partially the result of the sale of the stock of goods transferred by the said firm of J. M. Suarez & Company in the said document, which payments were kept by the Bank as a special deposit and applied partly on the payment of another small note of J. M. Suarez & Company which was not signed by defendants, and certain expenses; and the balance of Seven Hundred Sixty Dollars and Six Cents ($760.06) was applied to the reduction of the debt in question; that the said firm of J. M. Suarez & Company continued to do business for several months after the execution of the said document of March 13, 1901; that at the time of the final decree herein there remained due to Complainant on the note, secured by the mortgage described in the Bill of Complaint, in this case the sum of Six Thousand Four Hundred Seventy-six Dollars and Fifty-two Cents ($6,476.52), for principal and interest, together with the further sum of Six Hundred Dollars ($600.00), for costs and attorneys' fees, as provided by the terms of the said mortgage.

(12) That the stock of goods referred to in the said document of March 13, 1901, and in accordance therewith, was permitted by the Complainant-Bank to remain with said firm of J. M. Suarez & Company, and in the bankruptcy proceedings of the said firm, which subsequently took place, said stock, or what was left of it, was scheduled as a part of the assets of said firm; that the Complainant-Bank filed no claim in the bankruptcy proceedings and re-
65 ceived no part of the assets collected by the Trustee in Bankruptcy and distributed among the general creditors of the firm of J. M. Suarez & Co.

(13) That the defendant, Magdalena de la Cruz Cabrera, before receiving from her co-defendant, María de las Nieves Cabrera, the conveyance of the properties inherited by the latter from her mother, had knowledge of the lien of the Complainant Bank on the same by virtue of its said mortgage, and that such conveyance was made with the full knowledge of, and subject to, the rights of Complainant under its said mortgage.

Statement of the Rulings of the Court on the Admission or Rejection of the Evidence and the Exceptions Thereto.

In the testimony of Edwin L. Arnold, a witness in behalf of the Complainant, he was permitted, over the objection of the Defendant, to give the following testimony by way of explaining the execution of the document of March 13, 1901:

Q. To confine ourselves to what is important now, state what occurred just previous to, and which led up to, the making of this Bill of Sale.

Mr. DEXTER: I want to object to any testimony which has for its purpose or effect the modification or construction of a written docu-

ment which is in evidence and which speaks for itself and which must be construed according to its terms.

The COURT: The Court notes the objection and admits the rule of law, but receives the evidence.

Mr. DEXTER: Your Honor allow an exception?

A. As I remember it, this man Suarez, the older man in
66 the firm, came in one day and said that——

Mr. DEXTER: I object to that also, the statement of Mr. Suarez, a party who to all intents and purposes, so far as is shown, is subject to the process of this Court, and I object to the testimony as incompetent and hearsay.

The COURT: I don't know yet whether it is competent or not until I hear it.

Mr. DEXTER: I object to any statement which he may have made if it attempts to bind the Defendant in this case.

The COURT: Note that exception, because the Court is not yet certain of the phases of the case.

Mr. DEXTER: Note an exception. Note the same objection and an exception to all of these questions.

A. Some one in town held a claim against the firm, which they were going to endeavor to collect, which would cause them to close up the business of course. They asked me to take such security, to hold their stock as additional security for the purpose of protecting them against an embargo or against action of other creditors, which would close up the business and prevent me from making collection of my claim against them and to prevent them from going on with their affairs. They offered me this as an additional security, for that purpose, not that I requested.

Q. And after that what did you do?

A. I think I came up to your office and requested you to arrange the security in such a way as not to affect the original loan.

Q. In what hands or in the hands of what Notary was the drawing of the instrument placed?

A. Santiago R. Palmer.

Q. Did you have any further conversation with J. M.
67 Saurez & Company or either of them prior to the execution of the instrument?

A. Not that I know of.

Q. What were the instructions to Palmer as to what kind of an instrument to draw?

Mr. DEXTER: I object to that.

The COURT: The objection is sustained to that, because what was drawn is what counts.

Mr. PETTINGILL: That would be ordinarily correct, but what I want to show is this: That the instructions of Mr. Arnold were to draw a mortgage, a chattel-mortgage, and the reply of Mr. Palmer was that no such instrument was known to Porto Rican law; that it was impossible to fix it that way. And therefore and thereupon he was instructed to draw such an instrument as would carry out the

71 In the District Court of the United States for Porto Rico, Sitting at San Juan.

AMERICAN COLONIAL BANK
vs.
MARIA NIEVES CABRERA ET AL.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the American Colonial Bank and N. B. K. Pettingill, its Attorney:

Citation.

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for Porto Rico wherein Maria de las Nieves Cabrera and Magdalena de la Cruz are appellants and you are appellee, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness: The Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, this tenth day of June, 1907.

[Seal United States District Court for the District of Porto Rico.]

B. S. RODEY, *Judge.*

Attest:
H. H. SCOVILLE, *Clerk.*

Service of copy acknowledged, this 11 day of June 1907.

N. B. K. PETTINGILL,
Sol. for Appellee.

[Endorsed:] No. 142. Equity. American Colonial Bank *vs.* Maria de las Nieves Cabrera *et al.* Citation. Filed Clerks Office, United States District Court. June 11, 1907. H. H. Scoville, Clerk of the Court. By A. M. Bacon, Deputy.

V. D. P. 99.

[Endorsed:] No. 142. Equity. American Colonial Bank *vs.* Maria de las Nieves *et al.* Filed Clerks Office, United States District Court. June 11, 1907. H. H. Scoville, Clerk of the Court. By A. M. Bacon, Deputy.

Endorsed on cover: File No. 20,799, Porto Rico, D. C. U. S. Term No. 136. Maria de las Nieves Cabrera and Magdalena de la Cruz, appellants, *vs.* The American Colonial Bank. Filed July 16th, 1907. File No. 20,799.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 136.

MARIA DE LAS NIEVES CABRERA AND MAGDALENA DE LA CRUZ, APPELLANTS,

vs.

THE AMERICAN COLONIAL BANK, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

This suit was brought by the American Colonial Bank, a corporation organized under the laws of the State of West Virginia and having a place of business in the city of San Juan, Porto Rico, against Maria de las Nieves Cabrera y Pruna, Magdalena de la Cruz Cabrera y Pruna, and the Banco Territorial y Agricola, a corporation organized under the laws of the Kingdom of Spain and having a place of business in the city of San Juan, Porto Rico, which last-named defendant subsequently disclaimed any interest in the controversy and against whom no further proceedings were had or conducted (R., 29).

Previous to the year 1900 José Maria Suarez carried on a mercantile business in San Juan, Porto Rico. Shortly before that date he died, and two of his brothers, to wit: Ramon Suarez and Manuel Suarez—together with the widow of the said José Maria Suarez, appellant Maria de las Nieves Cabrera y Pruna, continued the business under a reorganization made in the early part of 1900 under the name and style of Successores de J. M. Suarez y Compañia, the same being a limited partnership or society known to the Spanish law as "Sociedad en Comandita," provided for in section 145-150 of the Spanish Code of Commerce (R., 29).

In this limited partnership appellant Maria de las Nieves Cabrera was a limited partner to the extent of eight thousand dollars ($8,000), *Provincial* currency, fully paid, because her husband had originally bought the store with her private funds and her said husband, or the said business, owed her at his death this sum of money, and she took an interest to that extent in the reorganized limited company with her said brothers-in-law, but she took no part in the management thereof (R., 30).

It may be stated, in this connection, that about the year 1900 the Spanish provincial currency in Porto Rico was redeemed at the ratio of sixty cents on the dollar.

The said limited partnership, being in need of money, borrowed from the complainant bank on the 21st day of February, 1900, the sum of *8,000 pesos*, provincial currency, equivalent to $4,800, United States currency, at the legal rate of exchange, and gave its promissory note to the bank therefor, payable in six months, at nine per cent. interest. This note appears on its face to be a joint note signed by the said limited partnership, Successores de J. M. Suarez y Compañia and appellant Maria de las Nieves de Suarez. It will be borne in mind that as said appellant was the widow of one Suarez she signed in the manner last-above indicated, implying thereby that she was the wife or widow of Suarez. A literal copy of this note appears on page 30 of the Transcript of

Record. Although apparently a joint-note, it does not contain the usual qualifying phrase found in similar obligations in civil law countries to the effect that the liability of the obligors shall be joint (*solidaria*) as distinguished from a several obligation (*mancomunada*). The note describes certain "collateral security for payment of this or any other liability or liabilities of ours to said company (bank) now existing or which hereafter may be contracted" which had been deposited with said bank (R., 30).

The "collateral security" consisted of a mortgage upon a house of appellant Maria de las Nieves Cabrera situated on Sol Street, in the city of San Juan, and also an attempted transfer by her to said bank of such interest which she might have as heir in the estate of her deceased mother, which at the time had not been partitioned or set apart, for which reason no definite description was, or could be, given of the particular property to which such transfer should apply.

In order to obtain this money the brothers-in-law of appellant Maria de las Nieves Cabrera, who were the active partners in the said limited partnership of Successores de J. M. Suarez y Compañia, induced her to execute to appellee the mortgage hereinafter described. This mortgage was executed on the 21st day of February, 1900, and contained the following stipulations, among others (pages 31-35, Transcript of Record):

> "*First.* That on this date the mercantile firm of "this city, Successores de J. M. Suarez y Compañia "(special partnership) as direct debtors, and the party "of the first part as surety for the debtors and prin- "cipal guarantor of the debtors, have executed and "signed to the order of the party of the second part, "a promissory note for 8,000 pesos, provincial "money, with interest at the rate of nine percentum "per year, payable in advance, for the term of six "months, and for value received.
>
> "*Second.* That the surety of the said obligation "has offered to the creditor, namely, the bank, and

" the latter has accepted, to execute in its favor a first " mortgage on a piece of property of her own and to " transfer to it certain inherited rights which she " possesses, both to respond for the payment of the " principal of the said obligation, of its interests, ex- " penses, costs, and damages which may accrue to " the creditor in case of the judicial claim in the form " and under the conditions which the appearing par- " ties are about to specify in the following clauses " R., 31):

" *Mortgages.*

" *First.* Mrs. Maria de las Nieves Cabrera y Pruna, " in order to guarantee the payment of 8,000 pesos, " current provincial money, principal amount of the " promissory note referred to in clause No. one of " this deed, of its interests in advance at nine per- " centum per year, and in case of judicial claim the " expenses, costs, and damages accrued to the creditor " up to the sum of 1,000 pesos, provincial money, " which she fixes for that purpose, she specially mort- " gages in favor of the American Colonial Bank of " Porto Rico the urban property, or 1-story house, " brick built, with flat roof, located on No. 75 Sol " street, third municipal district of this city, bounded, " etc.

(Here follows description of this house.)

" *Appraisement.*

" *Second.* In case of judicial claim and in accord- " ance with Article 127 of the Mortgage Law, the ap- " pearing parties hereby appraise the property in the " value of 9,000 pesos, provincial money, and hereby " renounce to any new appraisement.

" *Cession.*

" *Third.* The party of the first part, Mrs. Maria de " las Nieves Cabrera y Pruna, states that she is one " of the heirs of her legitimate mother, Mrs. Nieves " Pruna y Vanrosi, as per clause 9 of the will which

" she executed in this city on the 24th of February,
" 1898, before the notary, Mauricio Guerra Mon-
" dragon y Mejias, as well as legatee of the third part
" of free disposition, and with the right of being bet-
" tered in the other third part of the properties of
" the testatrix, both together with her sisters, Mrs.
" Josefa, Mrs. Magdalena, and Mrs. Ana Cabrera y
" Pruna, as per clause 5 of the will above referred to.

" And Mrs. Maria de las Nieves Cabrera y Pruna
" grants: that all and every, real and personal, rights
" which may belong to her as heir, as legatee, and as
" favored or bettered heir in the estate and properties
" of her deceased mother, Mrs. Nieves Pruna y Van-
" rosi, she cedes, renounces, and transfers without
" reservation in favor of the American Colonial Bank
" of Porto Rico, placing same in her place, person,
" action, and rights, with ample powers, in order that
" without the concurrence of said party of the first
" part it may intervene and attend to all of the acts
" of the will and testament of the mentioned Mrs.
" Nieves Pruna y Vanrosi: as to the appointment of
" appraisers, as to the liquidation, partition, and ad-
" judication of the inherited property, doing all the
" acts and taking all the steps required, or that the
" bank may deem convenient; executing and signing
" the public and private documents necessary for the
" completion of the testamentary proceedings, the
" bank taking possession for itself of the property
" which may be adjudicated to the ceding party.
" The object of the present transfer or cession is that
" if Mrs. Maria de las Nieves Cabrera y Pruna should
" fail to pay the 8,000 pesos, provincial money, or
" interests of the promissory note, of which she is
" surety, because of its maturity, it should not have
" been paid by Successores de J. M. Suarez y Com-
" pañia, the American Colonial Bank then, without
" prejudice to the foreclosure of the mortgage which
" she has executed in its favor, may collect from the
" value of the rights and properties corresponding to
" the ceding party according to the will of Mrs.
" Nieves Pruna y Vanrosi, the principal, interests,
" expenses, costs, and damages which may have been
" adjudicated to her in full, or from the part assessed

"to her in payment thereof, if the proceeds of the "sale of the property mortgaged should not be sufficient to cover the principal, interests, and other "expenses; and the American Colonial Bank may, at "its pleasure, if the ceded rights should be sufficient "to cover the total amount of its credit, it can pay "itself with them, and if not, foreclose the mortgage, "without waiving such personal action as it may "be entitled to take against the debtors and the "surety of the said promissory note; but if the said "note be paid at maturity, then the American Colonial Bank in return shall cede back to Mrs. Maria "de las Nieves Cabrera y Pruna the same rights "herein ceded" (R., 32, 33).

When this document was presented to the registrar of property the following notation was made thereon by him:

"The aforesaid document has been recorded as to "the mortgage within at folio 202 of volume 17 of "the city, property 130, duplicate, 11th inscription, "and the inscription as to the cession also mentioned "therein is denied, as no description is given of the "property, rights and action ceded, and therefore it "cannot be ascertained whether they are recorded in "favor of the party making the cession; and this defect, being such that it cannot be amended, the provisional inscription cannot be allowed.

"San Juan, Porto Rico, March 15, 1900.

"(Sgd.) The Registrar: José Benedicto."

(R., 34.)

Subsequent to the execution and registration of the foregoing mortgage upon the property on Sol Street, the testamentary proceedings relating to the estate of the deceased mother of appellants were terminated and the determination was made of the interest of the appellant Maria de las Nieves Cabrera y Pruna therein, whereupon such interest was assigned to her by a division made as the result of the separation and distribution to her of an undivided interest in four other properties in the city of San Juan, which are set forth in paragraph 6th of the statement of facts (R., 35).

On the 12th day of March, 1901, appellant Maria de las Nieves Cabrera y Pruna transferred by deed all of the above participations or hereditary interests to her sister, appellant Magdalena de la Cruz Cabrera y Pruna (R., 35).

On the 13th day of March, 1901, there was executed by and between the said limited partnership, Successores de J. M. Suarez y Compañia, without the intervention of appellant Maria de las Nieves Cabrera y Pruna, upon the one part, and the American Colonial Bank, appellee, upon the other, before the notary public Santiago R. Palmer, in the city of San Juan, a document, the effect of which is the principal issue and controversy in this case. This document contains the following stipulations among others:

"No. 149, in the city of San Juan, on March 31, "1901. Before me, Santiago R. Palmer, notary of "the college of Porto Rico and resident of this city "with abode on the first floor of the house marked "with No. 231 Fortaleza, corner of Cruz, appear as "party of the first part the Mercantile Society, Lim- "ited, doing business under the firm name and style "of 'Successores de J. M. Suarez y Compañia,' or the "establishment 'Bazar Europa,' No. 38 on Fortaleza "street, of this city, represented by its managers and "active partners Don Manuel and Ramon Suarez y "Cordero, of lawful age, bachelors, merchants, and "residents of this city, as it appears from the deed "under which the said society was formed under "date of February 6, 1900, executed before the "notary Mauricio Guerra Mondragon y Mejias, re- "corded on page 138 of volume 16th, relative to "partnerships, page 878, registration first.

"And as party of the second part Edwin L. Arnold, "of lawful age, married, cashier of the American Co- "lonial Bank of Porto Rico and resident of this city.

"Having to my judgment the legal capacity neces- "sary, without any limitation whatsoever, to execute "this deed of sale of dry goods,—and state:

"(1) The society Successores de J. M. Suarez y Com- "pañia now is debtor to the American Colonial Bank "of Porto Rico in the sum of $4,800.00, due on the

"21st of August, last, according to the promissory "note which they executed, and not being able to de- "liver the amount thereof have offered to make pay- "ment thereof in mercantile stocks according to the "detailed inventory which they exhibit, subscribed by "the society, and which they take with them, bear- "ing my signature and seal, and to which the credi- "tor bank has manifested its conformity.

"(2) That carrying into effect the sale of the "stocks set forth in the inventory exhibited, Messrs. "Suarez y Cordero, in the representation by which "they act, transfer all of the said effects set forth in "the said inventory to the creditor bank for the sum "of $4,800.00, leaving the same in the possession of "the bank in payment of said amount of the prom- "issory note above mentioned.

"(3) Mr. Edwin L. Arnold accepts this deed; re- "ceives the inventory above mentioned, and, in con- "sequence thereof, says that he leaves in the said "establishment of the seller, the Bazar Europa, all "of the stock and goods which such persons have "sold to him in payment for the $4,800.00 which "they owe to the American Colonial bank, in order "that for the account and commission of the latter "they proceed to realize from the said goods, prices "not to be less than those fixed in the inventory, "and they are obliged to present to the bank weekly "account of sales they may make, together with the "value in cash thereof, until the complete realization "of the same takes place" (R., 36).

The stock of goods transferred by the foregoing document to appellee was permitted by it to remain in the possession of Successores de J. M. Suarez y Compañia, who disposed of a portion of the same; and the latter concern having instituted bankruptcy proceedings voluntarily in December, 1901, in the District Court of the United States for Porto Rico, what was left of such stock was included in the schedules of bankruptcy as a part of the assets of the said limited partnership. Appellee, for some reason, filed no claim in the bankruptcy proceedings and received no part

of the assets collected by the trustee in bankruptcy and distributed among the general creditors of the said limited copartnership (R., 38).

December 17, 1901, appellee herein filed its bill of complaint, according to the forms and pleadings in equity, in the District Court of the United States for Porto Rico, against the appellants herein for the purpose of recovering from appellee Maria de las Nieves Cabrera y Pruna the amount of the note signed by her as guarantor for Successores de J. M. Suarez y Compañia, together with interest thereon, counsel fees, and costs (R., 1).

Said bill prayed that in default of the payment of said amount:

> "The usual decree may be made for the sale of the "mortgaged premises aforesaid to satisfy the amount "so found to be due, together with your orator's "attorney's fees, expenses and costs of this suit, and "that the said defendants and all persons claiming "by, through or under them subsequent to the be-"ginning of this suit, and all other persons having "any liens upon said mortgaged premises subsequent "to the mortgage of your orator, either as purchaser, "encumbrance or otherwise, may be barred and fore-"closed of all equity of redemption in or to the said "premises, or any part thereof, and that your orator "may have such other and further relief as the cir-"cumstances of the case may require and as the court "may deem proper and agreeable to equity" (R., 4).

The bill of complaint charged that appellant Maria de las Nieves Cabrera by the transfer made by her on the 12th of March, 1901, hereinbefore referred to, to her sister, appellant Magdalena, sought to deprive the appellee bank "of the benefit of its security in the property so obtained by her as above set forth from her said mother," and that "said pretended conveyance and transfer was made entirely without consideration, and was accepted by said defendant Magdalena de la Cruz Cabrera y Pruna, with full knowledge of the

rights and claims of your orator against the said property attempted to be conveyed by her."

An issue was duly made by the filing of separate answers by appellants. Appellant Maria de las Nieves Cabrera y Pruna set up the deed of sale of March 13, 1901, as a payment and discharge of the indebtedness; she alleged that her signature to the mortgage described in the bill of complaint was obtained by the false and fraudulent representations of her brothers-in-law, Manuel and Ramon Suarez, aided by an agent of the appellee bank, one Eduardo Costa y Gomez; that after the execution of the said note, and without her consent, appellee bank extended the time of payment thereof, and that it has also received from time to time various sums of money from the principal debtor on account of said indebtedness.

She averred that the transfer of her participation in her mother's estate to her sister, Magdalena, was made in good faith and for a full and valuable consideration.

Appellant Magdalena averred her good faith in the purchase of the said participations from her sister, Maria de las Nieves Cabrera y Pruna, based upon money considerations, and she denies that she had knowledge of any rights or claims in and to said participations upon the part of appellee.

Appellee proceeded throughout the cause below on the theory that the document executed February 21, 1900, was a mortgage not alone on the house on Sol street, which was then the actual property of appellant Maria de las Nieves Cabrera y Pruna, but also upon the interest or participation which she might have at the date of such instrument in the estate of her deceased mother.

Upon the trial of this cause below the principal contention of appellants was that the transfer of the stock of goods above referred to, in the manner and form in which it was made by the principal debtor, Successores de J. M. Suarez y Com-

pañia, and received by the creditor, appellee, the debt represented by the note and mortgage hereinabove set out was paid and discharged; and also that under all circumstances appellant Maria de las Nieves Cabrera y Pruna, being but a guarantor, was released from liability by reason thereof.

Appellee sought to avoid the force and effect of the said document and of the defense of appellants by the testimony of its cashier, Mr. Edwin L. Arnold, who represented it in the execution of such document, to the effect that it was not his purpose or intention to discharge the debt; that he did not know the contents of the document when he signed it.

The finding of fact (No. 9) made by the court below (page 37, Transcript of Record) contains a recital of the testimony, in substance, of cashier Arnold, upon which the court below undoubtedly based its finding and decree for appellee.

No charge is made by the appellee that either of the appellants took any part in the execution of said document of March 13, 1901, nor was any testimony offered charging, or attempting to charge, them or the partners of Successores de J. M. Suarez y Compañia with any fraudulent conduct in the execution of the said document.

A decree was rendered by the court below granting appellee all the relief it prayed for in and by its bill of complaint, and in that connection also decreed the transfer from appellant Maria to her sister, appellant Magdalena, to be without force or effect as against the prior *lien* of appellee.

Appellants respectfully insist that in the absence of any claim or charge of fraud in connection with the execution of the said document the court below should have given effect to its very plain and obvious language and should have held it to be a complete discharge and payment of the debt; and that the court below improperly admitted and considered the evidence of the cashier Arnold to destroy the force and effect of such document.

From the decree rendered by the court, as aforesaid, appellants duly prosecuted their appeal.

Appellants reply upon the following points:

(1) The deed of sale of March 13, 1901, was a complete payment and discharge of the debt for which appellant Maria de las Nieves Cabrera y Pruna became guarantor or surety.

(2) If the court should hold that by such document the debt was not paid or discharged, then we claim:

(*a*) Appellant Maria de las Nieves Cabrera y Pruna was but a guarantor and her liability must be determined as such.

(*b*) The deed of sale of March 13, 1901, was a novation.

(*c*) It constituted under all circumstances a modification of the security and released appellant Maria de las Nieves Cabrera, the guarantor.

(3) Appellee should be estopped from the relief it prays for as against appellants, for the reason that by its own negligence and misconduct it has failed to realize its debt from the stock of goods transferred to it.

(4) Appellee acquired no specific right or interest in the inheritance or participations of appellant Maria de las Nieves Cabrera y Pruna in the estate of her deceased mother for the reasons:

(*a*) Such participations were at the time of the execution of the document of February 21, 1900, unassigned.

(*b*) The said document did not, and could not, contain any specific description of the properties, and therefore by the laws of Porto Rico at the time, and by the failure of the registrar to make any inscription, no such right or lien was created, and appellant Magdalena acquired a valid title to the specific participations subsequently acquired by and set apart to appellant Maria de las Nieves Cabrera y Pruna.

(5) If the court should hold that the deed of sale of March 13, 1901, was not a payment or discharge, and that appellant Maria de las Nieves Cabrera y Pruna was not a guarantor, but was a principal debtor, jointly liable with Successores de J. M. Suarez y Compañia, then by the note and notarial document executed February 21, 1900, her liability is only several (mancomunada) and not joint (solidaria), and therefore she is not responsible for all of the debt.

ASSIGNMENT OF ERRORS.

In the court below appellants filed the following assignment of errors, which, in accordance with the rules of this court, they repeat here, and they rely upon the same for a reversal of this cause, viz:

(1) The action of the court in entering the decree herein, notwithstanding the release or receipt executed by complainant in favor of Successores de J. M. Suarez y Compañia on the 13th day of March, 1901, the said Successores de J. M. Suarez being the principal debtor for whom Defendant Maria de las Nieves Cabrera y Pruna was a surety.

(2) The action of the court in admitting parol testimony of the witness Edwin L. Arnold, cashier of the American Colonial bank, to nullify and make ineffective the said release and receipt.

(3) The decree of the court rendered herein is contrary to the evidence and to the equities of the case.

(4) The action of the court in entering a decree in favor of complainant, subjecting to the mortgage of February 21, 1900, the properties which were subsequently awarded to appellant Maria de las Nieves Cabrera y Pruna out of and from the inheritance in the estate of her deceased mother, which participation and assignment did not take place until after the said mortgage.

ARGUMENT.

Point No. 1.

THE DEED OF SALE OF MARCH 13, 1901, WAS A COMPLETE PAYMENT AND DISCHARGE OF THE DEBT FOR WHICH APPELLANT MARIA DE LAS NIEVES CABRERA Y PRUNA BECAME GUARANTOR.

Preliminary to the discussion of the points hereinbefore indicated, it is necessary to understand the position of appellant Maria de las Nieves Cabrera y Pruna with respect to the limited copartnership of Successores de J. M. Suarez y Compañia.

As appears in the findings of fact of the court below, she was a limited or silent partner to the extent of 8,000 pesos, provincial currency, or $4,800 gold, which amount she had contributed to the society before the transactions involved in this suit.

The firm or society of Successores de J. M. Suarez y Compañia was of the class known to Spanish law as "Sociedades en Comandita" or limited copartnerships.

The term "limited" or "silent" partner in Spanish is "Comanditario." This term has been translated in the War Department edition of the Spanish Code of Commerce of 1886, in force in Porto Rico, as "Special Partner."

Article 148 of this Code provides:

> "The liability of special partners ("Comandatarios," or limited partners) for the obligations and losses of the copartnership shall be limited to the funds which they contributed, or bound themselves to contribute, to the limited copartnership, with the exception of the cases mentioned in article 147. Special partners cannot take any part whatever in the management of the interests of the copartnership, not even in the capacity of special agents of the managing partners."

The Supreme Court of Spain, in construing this article, in its decision of December, 1861, held that special partners discharged their duty in contributing to the copartnership the amount agreed upon.

As from the findings of the court below it appears that appellant Maria de las Nieves Cabrera y Pruna had fully contributed the sum of $4,800.00 gold to the copartnership, she could not, under the law of Porto Rico, be responsible for its debts to any additional or greater amount.

So far as appellee is concerned with respect to the note and mortgage executed by her, she cannot be considered in the light of a general partner. The court below established a false premise in its decree by erroneously holding her to be liable as a general partner. So far as concerns appellee, therefore, and with respect to the note and mortgage executed by her, she must be considered as any other third person incurring liability only as a guarantor. We shall subsequently discuss this liability under another heading.

THE DEED OF SALE OF MARCH 13, 1901, WAS AN ABSOLUTE PAYMENT AND DISCHARGE OF THE DEBT.

The language of this document is too clear and plain to admit of discussion as to its meaning or justify the introduction of parol testimony. It is a transfer of a stock of goods by the debtor to appellee "in payment of the debt." The appellee accepted the same "for the sum of $4,800.00," as appears in the second paragraph of the document.

This stock was left by appellee in the possession of the debtor to be realized upon for the benefit of the former. It was only natural that such stock could be sold to better advantage by the debtors in their place of business than by the bank.

The only defense made by appellee to avoid the plain and positive meaning and effect of this document was that the bank's cashier, Mr. Arnold, did not understand the nature

and effect of the document when he signed it. In paragraph 9 of the findings of fact, made by the court below, the court recites the testimony of Mr. Arnold upon t' subject. This paragraph does not constitute a finding of imate facts by the court, and we believe is insufficient for the purpose.

But if we consider it for all that it may be worth, it falls far short of a legal reason for avoiding the document in question. No charge of fraud is made against either the principal debtor or the guarantor, the appellant Maria de las Nieves Cabrera y Pruna.

Mr. Arnold admitted that the document was read to him, but it appears that he was under the idea that his bank was taking the stock only "as additional security for the purpose of protecting them against the action of the other creditors, which would close up the business and prevent the bank from collecting its claim against them * * * that he took little or no interest in it."

We submit that the explanation of Mr. Arnold did not justify the court below in disregarding the plain meaning and effect of the document. This testimony was by appellants objected to, and, upon their objection being overruled, due exception was taken. The rulings of the court on the admission of this evidence have been brought up in proper manner by the appellants. (See pages 38-41, inclusive, Transcript of Record.)

The rights and liabilities of the parties herein so far as the law is concerned must be determined by the Spanish Civil Code of 1889, in force in Porto Rico until its revision in 1902. Our references to the Civil Code, therefore, are to the former code.

> "Obligations arising from contracts have legal force
> " between the contracting parties and must be ful-
> " filled in accordance with their stipulations.
> Article 1091.
>
> " Contracts shall be binding whatever may be the
> " form in which they may have been executed, pro-

"vided the essential conditions required for their "validity exist.

Article 1278.

"If the terms of a contract are clear and leave no "doubt as to the intentions of the contracting parties "the literal sense of its stipulations shall be observed.

Article 1281.

"Commercial contracts shall be executed and com- "plied with in good faith according to the terms in "which they were made and drafted without evading "the honest, proper and usual significance of the "written or spoken words with arbitrary interpreta- "tions, nor limiting the effects which are naturally "derived from the manner in which the contractors "may have explained their wishes and contracted "their obligations.

Article 57, Code of Commerce.

"When the clauses of a contract are clear and ex- "plicit there is no necessity to have recourse to the "rules for interpretation."

Decisions of the Supreme Court of Madrid, April 11 and June 19, 1865, also March 1, 1862; see also Decisions of March 21, 1900, October 12, 1900, January 10, 1901, April 24, 1901, July 6, 1901.

The action of the court below in admitting parol testimony of the witness Arnold to explain the document in question was error.

By the Law of Evidence of Porto Rico, in force at the time of the trial below, this evidence was clearly incompetent:

"When the terms of an agreement have been re- "duced to writing by the parties it is to be con- "sidered as containing all those terms, and there- "fore there can be between the parties and their rep- "resentatives or successors in interest no evidence of "the terms of the agreement other than the contents "of the writing, except in the following cases:

"(1) Where a mistake or imperfection of the writ-
" ing is put in issue by the pleadings.
"(2) Where the validity of the agreement is the
" fact in dispute."

Section 25, Law of Evidence, enacted by the Legislative Assembly of Porto Rico, and approved by the governor March 9, 1905.
(See acts and resolutions of Porto Rico, 1905, page 73.)

But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 28, or to explain intrinsic ambiguities, or to establish the illegality or fraud. The term "agreement" includes deeds and wills as well as contracts between the parties.

"For the proper construction of an instrument,
" the circumstances under which it was made, includ-
" ing the situation of the subject of the instrument
" and of the parties to it may also be shown, so that
" the judge be placed in the position of those whose
" language he is to interpret."
Section 28, same law.

The foregoing sections of the Law of Evidence of Porto Rico do not justify parol evidence to interpret a document which is clear and positive in its meaning and concerning which there can be no doubt. There is no ambiguity in the document in question; no mistake or imperfection of the writing was put in issue by the pleadings, nor was the validity of the agreement in dispute.

We refrain from citing American authorities upon such an elementary rule.

POINT No. 2.

IF THE COURT SHOULD HOLD THAT BY SUCH DOCUMENT THE DEBT WAS NOT PAID OR DISCHARGED, THEN WE CLAIM:

(*a*) Appellant Maria de las Nieves Cabrera y Pruna was but a guarantor, and her liability must be determined as such.

(*b*) The deed of sale of March 13, 1901, was a novation.

(*c*) It constituted under all circumstances a modification of the security and released appellant Maria de las Nieves Cabrera y Pruna, the guarantor.

The obligation of the appellant Maria de las Nieves Cabrera y Pruna was that known to the Spanish law as "fianza," and is treated in title XIV, book 4, of the Spanish Code of 1889, beginning with section 1822. The War Department edition of this Code translates the term "fianza" as "security," which covers both the relationship of surety and guarantor.

The only distinction in the Spanish law in the liability of one giving security ("fiador," translated generally as "surety") is that between the joint liability (solidaria) and the several liability (mancomunada).

> "By security (fianza) a person binds himself to "pay or perform for a third person in case the latter "should fail to do so. If the surety binds himself "jointly (solidariamente) with the principal debtor "the provisions of section fourth of chapter 3, title 1, "of this book shall be observed."
>
> Article 1822, Civil Code, 1889.

The reference to section fourth, chapter 3, title 1, is to articles 1137-1148, inclusive, relating to both joint and several obligations. Article 1137 provides:

> "The concurrence of two or more creditors, or of "two or more debtors, in a single obligation does not "imply that each one of the former has a right to "ask nor that each one of the latter is bound to com- "ply in full with the things which are the objects of "the same. This shall only take place when the "obligation determines it expressly, being constituted "as a joint obligation."

It will be observed that the note in question, signed by appellant Maria de las Nieves Cabrera y Pruna, fails to contain the express provision that the obligation shall be joint.

It must, therefore, be considered simply as an obligation of security for which said appellant is only secondarily liable.

The obligation of a fianza is accessory to a principal obligation.

Articles 1847-53, inclusive, of the Code of 1889 relate to the "extinguishment of securities":

> "If the creditor voluntarily accepts real estate, or
> "any other goods, in payment of the debt, even
> "should he afterwards lose them on account of evic-
> "tion, the surety shall be released."
> Article 1849.

> "The extension granted to the debtor by the cred-
> "itor without the consent of the surety extinguishes
> "the security."
> Article 1851.

> "The sureties, even when they are joint, shall be
> "released from their obligation whenever by any act
> "of the creditor they cannot be subrogated to the
> "rights and mortgages and privileges of the same."
> Article 1852.

It is a general rule that contracts of this nature are construed strictly in favor of the surety.

(*b*) The deed of sale of March 13, 1901, was a novation.

It cannot be successfully contended that the acceptance by the appellant bank of the stock of goods transferred to it by its debtor was simply an additional security. On the contrary, it was in fact and law a substitution of the debt. It was what the Spanish law terms a "novacion de objeto."

> "The objective novation can be realized by a
> "change of consideration and of the object of the
> "obligation. Novation takes place by the change of
> "consideration if it alters the method of owing or the
> "nature of the obligation; the very example of law,
> "in the case of what the purchaser of a thing owes
> "for its price is substituted or converted into a debt

"by way of a loan. The novation of the object takes "place when the subject or contents of the presta- "tion in which the obligation consists changes: for "example, if for a sum which is due it is substituted "by the prestation of a service, or *vice-versa,* or the "amount due is modified, or there is produced some "important change in the place or form of compli- "ance of the obligation. Whenever there results "any of the preceding cases, or any other analogous "thereto, there will be understood as affected the ob- "jective novation, whether the *voluntas novandi* ex- "pressly appears or whether the novation is deduced "as a necessary result from the incompatibility be- "tween the primitive and subsequent obligation."

Vol. 4, p. 428, Derecho Civil, by Sanchez Roman.

"Besides those which are deduced from the pre- "ceding doctrine, novation has the following effects:

"(1) To extinguish the obligation which has been "substituted and all its accessories and of the guar- "antee unless the contrary shall have been expressly "stipulated, in which case these guarantees will be "considered as re-established, as pertaining to the "new obligation and in virtue of a new contractual "motive, since notwithstanding that in addition to "the rule of law that the accessories follow the condi- "tion of the principal, the obligation newly con- "tracted, which is the consideration of the novation, "remains as the principal one and can not have as "accessories the obligations of the security, mortgage, "and guarantee in general previously created."

Same author, p. 431.

The subject of novation is treated in the Spanish Civil Code of 1889 in Articles 1203-1213, inclusive.

"Obligations may be modified,

"(1) By the change of their object or principal conditions.

"(2) By substituting the person of the debtor.

"(3) By subrogating a third person in the rights of the creditor."

Article 1203.

Point No. 3.

APPELLEE SHOULD BE ESTOPPED FROM THE RELIEF IT PRAYS FOR AS AGAINST APPELLANTS, FOR THE REASON THAT BY ITS OWN NEGLIGENCE AND MISCONDUCT IT HAS FAILED TO REALIZE ITS DEBT FROM THE STOCK OF GOODS TRANSFERRED TO IT.

We confidently believe that the facts in this case justify the statement of the foregoing point, and that without the citation of authorities this court will admit the equity of the proposition.

Point No. 4.

APPELLEE ACQUIRED NO SPECIFIC RIGHT OR INTEREST IN THE INHERITANCE OR PARTICIPATIONS OF APPELLANT MARIA DE LAS NIEVES CABRERA Y PRUNA IN THE ESTATE OF HER DECEASED MOTHER, FOR THE REASONS:

(*a*) Such participations were at the time of the execution of the document of February 21, 1900, unassigned.

(*b*) The said document did not, and could not, contain any specific description of the properties, and therefore by the laws of Porto Rico at the time, and by the failure of the registrar to make any inscription, no such right or lien was created, and appellant Magdalena acquired a valid title to the specific participations subsequently acquired by and set apart to appellant Maria de las Nieves Cabrera y Pruna.

The deed of mortgage and cession executed by appellant Maria de las Nieves Cabrera y Pruna on the 21st day of February, 1900, shows that her interest in the estate of her mother had not yet been determined or assigned.

The Civil Code in force in Porto Rico at the time of the execution of the mortgage and supposed cession by appellant,

Maria de las Nieves Cabrera, to the American Colonial Bank, provided, among other things:

> "The following are essential requisites of contracts of pledge and of mortgage:
> "(1) That they be constituted to secure the fulfillment of a principal obligation.
> "(2) That the thing pledged or mortgaged is owned by the person who pledges or mortgages it."
> Article 1857.

> "The following property only can be the subject of a mortgage contract:
> "(1) Real property.
> "(2) Property rights in real estate which can be alienated in accordance with law."
> Article 1874.

The mortgage law of Porto Rico applicable or in force at the time contained the following provisions:

> "Article 108. The following are not mortgageable:
> * * * * * * *
> * * * * * * *
> * * * * * * *
> * * * * * * *
> "(5) The property right in things which, although they will be owned in the future, are not yet recorded in the name of the person who will have a right to own them."

Articles 110 and 111 of the Mortgage Law set forth to what things a mortgage shall be held to extend. They do not include future hereditary rights of the kind described in the document under consideration.

Galindo, the commentator of the mortgage law, in commenting upon article 108, above set forth, says:

> "The prohibition of (5) of article 108 refers in "special manner to hereditary rights. * * *
> "Reasons of another kind advise that there cannot "be mortgaged the real property right in things

"which, although are to be possessed, are not yet "inscribed in favor of the one who may have the "right to possess them. * * *

"But, further, it was necessary that the mortgage "law should put itself in accord with the civil law, "which is opposed, especially with respect to succes- "sions, to the transfer of an expectation of those who "have the presumption of succeeding a determined "person. We believe that the motives just set forth "are superfluous when a mortgage of real rights is "treated of; it is sufficient to prevent a mortgage of "the same that such real property rights are not "inscribed in the name of the person who mortgages "them and does not appear as their owner in the "registry of property; and not appearing in the "registry as such he cannot mortgage them."

Galindo, "Legislacion Hipotecario," vol. 3, p. 199.

Again, in the Civil Code, published subsequent to the mortgage law, it is provided in article 1857, in a decisive manner:

"That it is an essential requisite of contract of "mortgage that the property mortgaged shall belong "absolutely to him who mortgages it, and therefore "there should not in strict right be admitted to in- "scription a deed of mortgage executed by one who "is not the owner of the thing mortgaged."

Same work and volume, p. 279.

As we more confidently rely upon the other points in this case, we do not enter into a discussion of the law bearing on this point. We believe that under the facts before the court it must be held that the alleged cession of hereditary rights in the document of February 21, 1900, is not effective as against appellant Magdalena. Whilst it is true that the mortgage contained in the document was inscribed in the Registry of Property, the record clearly shows that the attempted cession was not inscribed, because at the time of the execution of the said document the participation or interest

of appellant Maria de las Nieves Cabrera y Pruna was not known.

Upon these participations being determined and set apart, appellant Maria de las Nieves Cabrera y Pruna had the power to transfer the same and appellant Magdalena acquired a good title thereto.

No evidence was offered beyond the fact of appellants being sisters to overcome the evidence of consideration and good faith offered by appellants in the trial below.

Point No. 5.

If the court should hold that the deed of sale of March 12, 1901, was not a payment of discharge, and that appellant Maria de las Nieves Cabrera y Pruna was not a guarantor, but was a principal debtor, jointly liable with Successores de J. M. Suarez y Compañia, then by the note and notarial document executed February 21, 1900, her liability is only several (mancomunada) and not joint (solidaria), and therefore she is not responsible for all of the debt.

In that part of the Civil Code which treats of several and joint obligations, the following articles are found in support of the above proposition:

> "Article 1137. The concurrence of two or more "creditors, or of two or more debtors, in a single obli- "gation does not imply that each one of the former "has a right to ask, nor that each one of the latter is "bound to comply in full with the things which are "the object of the same. This shall only take place "when the obligation determines it expressly, being "constituted as a joint obligation.
>
> "Article 1138. If from the context of the obliga- "tions referred to in the preceding article any other

" thing does not appear the credit or the debt shall
" be presumed as divided in as many equal parts as
" there are creditors or debtors, being considered as
" credits or debts each one different from the other."

WE RESPECTFULLY SUBMIT THAT THE DECREE OF THE COURT BELOW SHOULD BE REVERSED.

FRANCIS H. DEXTER,
Solicitor for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 136.

MARIA DE LAS NIEVES CABRERA Y PRUNA AND MARIA DE LA CRUZ CABRERA Y PRUNA, APPELLANTS,

vs.

AMERICAN COLONIAL BANK, APPELLEE.

BRIEF FOR APPELLEE.

Statement.

As the facts in this case are undisputed, and, as counsel for appellants have doubtless stated them fully in their brief, a very concise restatement of them here will be all that is necessary.

In making references to the record herein the pages of the printed record will be specified.

The appellee filed its bill of complaint on the equity side of the court below to foreclose a mortgage which had been executed in its favor by Maria de las Nieves Cabrera, one of the appellants. The mortgage was in the ordinary form used in Porto Rico, and was of the usual content, except that, instead of being given to secure a direct and personal indebtedness of the grantor alone, it was given as collateral security for

the payment of a promissory note in favor of the appellee for money borrowed by a commercial firm doing business under the name of Sucesores de J. M. Suarez & Co., in which firm said appellant was a silent partner. The note itself was also signed by both said firm and said appellant as principals (Record, pages 30, 31).

The property given as security in this mortgage consisted, first, of a house and lot in the city of San Juan, Porto Rico, which was specifically described therein, and, second, of the interest of said grantor in the property left by her deceased mother, of which the description contained in said mortgage was as follows (translated):

> "The party of the first part, Mrs. Maria de las Nieves Cabrera y Pruna, states that she is one of the heirs of her legitimate mother Mrs. Nieves Pruna y Vanrosi, as per clause nine of the will which she executed in this city on the 24th of February, 1898, before the notary Mr. Mauricio Guerra Mondragon y Mejias, as well as legatee of the third part of free disposition, and with the right of being bettered in the other third part of the properties of the testatrix, both together with her sisters, Mrs. Josefa, Mrs. Magdalena, and Mrs. Ana Cabrera y Pruna, as per clause fifth of the will above referred to.
>
> "And Mrs. Maria de las Nieves Cabrera y Pruna grants: that all and every real and personal right which may belong to her as heir, as legatee, and as favored or bettered heir in the estate and properties of her deceased mother, Mrs. Nieves Pruna y Vanrosi, she cedes, renounces and transfers, without reservation, in favor of the American Colonial Bank of Porto Rico, placing same in her place, person, action and rights," etc. (page 32, 3d paragraph).

The bill of complaint was in the usual form of a bill of foreclosure in equity, with a copy of the mortgage attached as an exhibit. The answer of appellant Maria de las Nieves Cabrera set up that her signature to this mortgage had been obtained by fraud; that the firm of Sucesores de J. M. Suarez

& Co. had paid the debt secured thereby; that the original note signed by her had been renewed without her knowledge or consent, and that appellee had accepted a bill of sale of the stock of merchandise belonging to said firm of Sucesores de J. M. Suarez & Co. in full payment of said indebtedness and had executed a public document acknowledging the same (pages 6, 7). She also denied that the transfer of her inheritance made by her to her sister and co-appellant was with knowledge of the rights of appellee; but, as the assignments of error do not question the conclusions of the court against the appellants on that point, it is not material here.

The answer of the co-appellant, Maria de la Cruz Cabrera, is limited to this latter question of the transfer to her of said inheritance of her sister, and for the same reason it is not material to refer to it further. In fact, it is apparent that the real appellant is the first named, and that her sister merely joins to conform to the rule (pages 7, 8).

These answers, as they appear in the record, contain only what remained therein after exceptions to various paragraphs thereof as originally filed had been sustained and such paragraphs had thereby been stricken therefrom—a fact which explains the long period of time shown by the record to have elapsed between the filing of the answers and of the replication of the complainant thereto. Such replication was finally duly filed, and the cause was tried upon the issues as made by the answers as above stated.

During the progress of the cause the testamentary proceedings upon the estate of the said Mrs. Nieves Pruna y Vanrosi, mother of appellants, was ended and certain specific interests in specific properties set apart to appellant Maria de las Nieves Cabrera as her share of said estate (page 35, Statement 6), and those are the same interests subjected by the decree to the mortgage lien (page 25, paragraphs 2, 3, 4, and 5).

The court below, after hearing the evidence, rendered an exhaustive opinion (pages 13-23), finding the equities to be

with the appellee and authorizing a final decree in its favor, which was thereupon entered (pages 23-25). Thereafter, at the request of appellants for the purpose of appeal, the court made, or rather signed, a "Statement of the Facts" as found by it, intended to be a compliance with the act of April 7, 1874 (18 Stat. at Large, 27), including also certain rulings upon the admission of evidence (pages 29-41), and thereafter perfected their appeal to this court.

ARGUMENT.

To reverse the final decree entered in the manner and to the effect above described, the appellants have assigned four errors on the part of the court below (page 26), which we now proceed to consider and discuss in their order:

I.

> "The action of the court in entering the decree herein notwithstanding the release or receipt executed by complainant in favor of the Sucesores de J. M. Suarez y Ca. on the 13th day of March, 1901, the said Sucesores de J. M. Suarez y Ca. being the principal debtor for whom defendant Maria de las Nieves Cabrera y Pruna was a surety."

In the first place, it is to be noticed that this assignment of error is based in one particular upon a misapprehension of facts. The trial court found that defendant, Maria de las Nieves Cabrera, was a partner in the firm mentioned (page 29, par. 2), and she signed the note as a principal (page 31, top). When a bank loans money and takes security, either by additional signatures to the note or by mortgage on real property, it is understood that the bank looks equally to the principal and the surety or security for payment of the loan. While, as between themselves, one may be primarily and the other secondarily liable, they are both equally liable to the

bank; that is the object for which the bank has required the security. As was said by this court:

> "There are many authorities sustaining the proposition that a surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee; or, in other words, that the contract stands as expressed in the writing in the absence of conditions which are known to the recipient of the promise."
>
> *Joyce vs. Auten*, 179 U. S., 591.

and the unconditional promise contained in the collateral note and the mortgage was that if the firm of Sucesores de J. M. Suarez & Co. *did not pay* at maturity this security should be liable for the debt.

This is practically admitted by counsel for appellants, who by their assignment of error depend upon the contention that the "release or receipt" executed by appellee on the 13th day of March, 1901, conclusivly shows payment of the debt. The court decreed to the contrary, and after so many decisions upon the subject it is needless to do more than refer to the settled doctrine that in investigating that question this court can go no further than to inquire whether the facts found support the decree.

Salina Stock Co. vs. Salina Irr. Co., 163 U. S., 109.

Appellants are evidently depending upon the terms of the instrument in question, which recites a sale of a stock of goods to the bank in consideration of the payment of the note referred to; but the court will notice that even in the instrument itself, in its third paragraph (page 33), it is stated that the bank left the stock of goods in the possession of the debtor firm in order that it might be sold by them.

But what are the findings of the court as to this transaction? Paragraph 8 of the statement contains a recital of this instrument *verbatim;* but that is the finding of an evidentiary, not an ultimate, fact, while the latter part of

paragraph 11 and paragraph 12 (page 38) contain a finding of ultimate fact that neither the stock of goods referred to in said bill of sale, nor the proceeds thereof, were ever appropriated to the benefit of appellee bank, but *were* appropriated to the benefit of said firm of Suarez & Co. or its creditors in bankruptcy, and that at the time of the final hearing and decree there remained due on the note described in and secured by the mortgage of appellant Maria de las Nieves Cabrera the sum there stated, which was the sum for the payment of which the decree was entered. In addition to this, paragraph 9 (page 37) contains a finding of ultimate fact that—

> "There was no agreement or understanding of any character whatever between the parties that the making of this instrument should be considered as full payment of the main loan or debt; that he (the representative of appellee) never saw their stock of goods, or any part of it, or went to their store; that they (Suarez & Co.) remained in possession of it; that he took it (the bill of sale) merely at their request to protect them and keep them going, and that he surely would not have signed the document to release a note and take a stock of goods as a substitute for a real-estate mortgage which he already had and on the strength of which the bank made the loan."

These findings support the decree, and the only question that can possibly remain open—if, indeed, that question be open—is whether said findings are contradicted by the evidentiary finding in paragraph 8, and, if so, which should prevail.

It would appear from the language of various decisions of this court that, in appeals from territorial courts, findings which are of evidentiary, rather than ultimate, facts will not be considered as proper findings; but we do not care to rest our contention upon a technicality. We contend that the court below had the right to go behind the face of the instrument in question and investigate its real consideration and legal effect.

We believe it to be well settled that any court with equity jurisdiction not only possesses the right, but must perform the duty, in a proper case, in order to ascertain the real transaction, to go behind the recitals of an instrument of conveyance and construe it according to its true consideration and significance.

This has never been more clearly or concisely stated than in a well-known decision of this court:

> "It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus, it may be shown that the deed was made to defraud creditors, or to give preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice." (Citing precedents.)
>
> *Peugh vs. Davis*, 96 U. S., 332.

To the same effect are a long line of decisions, including—

Hughes vs. Edwards, 9 Wheat., 489.
Morris vs. Nixon, 1 How., 118.
Russell vs. Southard, 12 How., 139, 147.
Babcock vs. Wyman, 19 How., 289, 299.
Risher vs. Smith, 131 U. S., CLVI App.

The case of *Babcock vs. Wyman, supra,* besides containing a full consideration of the subject, cites several cases in which bills of sale of personal property were the instruments involved.

Naturally, nearly all the adjudged cases are the converse of the one at bar—that is, the grantor in the deed or bill of sale is the party asking relief against its absolute form and asserting it to have been given only as security; but, fortunately, we are not without one adjudication of this court where the grantee in a bill of sale was in exactly the same position as the appellee was in the case at bar.

Morgan's Assignees vs. Shinn, 15 Wall., 105.

In that case Morgan and three others, to wit, Comstock, Kelly, and Savage, became joint owners of a vessel. One Shinn had advanced the money to Kelly to buy his share, and had by advice taken as security, instead of a mortgage, a straight bill of sale. The vessel became indebted and subject to liens, which the appellants therein, as assignees of the shares of Morgan and Comstock, had paid. They sued Shinn for contribution, claiming him to be liable as a part owner by virtue of the bill of sale to him from Kelly. Shinn made the defense that his bill of sale conveyed no title to him, as he had taken it simply as security for the money loaned Kelly, who still really remained the owner of his share and the only one liable for contribution—and so this court held.

We therefore submit that the finding of the court below, that the bill of sale of the stock of goods was not a sale at all, but a mere security taken at the instance of the debtors; that, never being followed by possession or payment of any consideration, it conveyed no title and did not act as a satisfaction of the existing indebtedness or affect it in any way, is in entire accord with the Shinn case, above cited, and in fact with the whole line of cases involving the same applicable principle.

But it may be contended that the District Court of the United States for Porto Rico has no right or jurisdiction to grant relief upon equitable principles. In fact, such contention has been lately made by some members of the bar in Porto Rico, based largely upon the decision of this court in the case of *Romeu vs. Todd*, 206 U. S., 358. But we do not so interpret that decision.

The extent of the decision in the Romeu case, as we understand it, was that a general equitable principle could not be applied in Porto Rico, considering certain language of the Foraker act, so-called, in derogation of a specific provision of the local law which constituted a rule of real property—not because the court was lacking in equitable jurisdiction, but because in the exercise of that jurisdiction a settled rule of real property must be recognized and enforced. The court did not say, and we believe had no intention of intimating, that the principle announced would have any application where the recording laws affecting real property were not involved.

In the case at bar, on the other hand, no real property or recording law is involved: the sole question is the right of the court of equity to investigate the consideration for and the legal effect of a notarial instrument involving personal property only. When the Congress of the United States created the court which rendered the decree below now under review its grant of power and jurisdiction was made in the following language:

> "The district court for said district * * * shall have, in addition to the *ordinary jurisdiction* of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein *in the same manner as a circuit court*."
>
> Act of April 12, 1900, Sec. 34.

It seems to us, therefore, that the court below was endowed with all the "ordinary jurisdiction" of both circuit and dis-

trict courts of the United States, and had the right and power to proceed in the consideration and decision of any case within that jurisdiction on the same principles, whether equitable or otherwise depending on the nature of the case, as would those courts of the United States.

But, for the present purpose, it is not even necessary to insist upon that proposition, because the question raised by the present assignment of error is simply a question of the *kind of evidence* the court was entitled to receive and consider in determining the construction and effect of the instrument in question. If the law of evidence of Porto Rico would require the insular courts, which have no equity jurisdiction, to receive the same evidence and reach the same result, then there is an end of the controversy. And that is exactly what would be required, as has been directly determined by the Supreme Court of Porto Rico.

In a case decided by that court on the 28th day of June, 1906, the facts were stated by the court to be that one Texidor and his wife, the owners of certain real estate, had given to a pawnbroker named Robert a mortgage thereon for a loan, which on its face stipulated for interest at a legal rate, but in fact a much smaller sum had been delivered to the mortgagors. Afterwards the real estate was purchased by one Horton, who then brought suit to have the mortgage canceled on the ground that it was void for usury, the local statute being thus severe in that respect, and said purchaser set up the actual transaction showing usury. The pawnbroker defended on two grounds: one, that his license as a pawnbroker protected him; the other—that in which we are interested—that as the mortgage recited a legal rate of interest the court could not go behind that recital to investigate the true transaction. Both these contentions were treated by the court with scant consideration, and in determining the second it used the following language:

> "Parece que el demandado cree, y toda su alegación está basada en esta creencia, que para que una

hipoteca sea declarada usuraria, la usura deberá aparecer del documento mismo. Tal aserción convertaría la ley sobre usura en letra-muerta, y está directamente en conflicto con la sección 25 de la Ley de Evidencia de Puerto Rico. El apelado tambien presume que el objeto de un contrato escrito no puede constituir materia de averiguación por parte de un Tribunal, al examinar su validez, sino que el Tribunal debe presumir que haya sido manifestado correctamente en el mismo contrato. Esta presunción del apelado es contraria al inciso 2do de la sección 101 de la Ley de Evidencia de Puerto Rico y á la jurisprudencia establecida por las Cortes Americanas. No importa que motivo ó causa es expresado en un contrato escrito, la verdad de sus cláusulas no se presume de una manera conclusiva, sino que pueden ser siempre materia de averiguación ante una corte, y puede por tanto proponerse y recibirse prueba para demostrar cual fué el verdadero motivo ó causa de la obligación que se establezca. Véase tambien el parrafo 38 de la sección 102 de la Ley de Evidencia de P. R."

Horton et al. vs. Robert, 3 Castro's Decisiones de Puerto Rico, 410, 415.

A substantially correct translation of the above extract is as follows:

"It seems that the defendant believes, and his whole contention is based on this belief, that for a mortgage to be declared usurious the usury must appear from the document itself. Such an affirmation would convert the law of usury into a dead letter, and is directly in conflict with section 25 of the Law of Evidence of Porto Rico. The appellee also presumes that the object of a written contract cannot constitute the subject of investigation by a court, upon examining into its validity, but that the court must presume that it has been stated correctly in the contract itself. This presumption of the appellee is contrary to the 2nd subdivision of section 101 of the Law of Evidence of Porto Rico and to the law established by the American courts. No matter what motive or consideration is expressed in a written contract, the truth of its pro-

visions is not conclusively presumed, but the same can always be the subject of investigation before a court, and therefore proof can always be proposed and received in order to demonstrate what was the true motive or consideration of the obligation which may be established. (See also paragraph 38 of section 102 of the Law of Evidence of Porto Rico.")

The portions of the Law of Evidence referred to in the above extract read as follows:

"SECTION 25. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute.

"But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section twenty-eight, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties.

"SECTION 28. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

"SECTION 101. The following presumptions, and no others, are deemed conclusive: * * *

"2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration. * * *

"SECTION 102. All other presumptions are satisfactory, if uncontradicted. They are denominated

disputable presumptions and may be controverted by other evidence. The following are of that kind: * * *

"38. That there was a good and sufficient consideration for a written contract. * * *

"SECTION 107. No evidence shall be considered as conclusive or unanswerable, unless so declared by this act."

Laws of Porto Rico, 1905, pages 73, 74, 87, 88, 90.

In the same connection should be considered Article 1186 of the Civil Code of Porto Rico, which reads as follows:

"Public instruments are evidence even against a third person of the fact which gave rise to their execution and of the date of the latter.

"They shall also be evidence against the contracting parties and their legal representatives with regard to the declarations the former may have made therein."

Revised Statutes and Codes of Porto Rico, 1902.

"Shall be evidence," the court will notice—*not* conclusive or *unanswerable* evidence.

In view, therefore, of the settled American law, and of the demonstrated consonance of the Porto Rican law therewith, we feel confident the court will find no ground for reversal in the first assignment of error.

II.

"The action of the court in admitting parol testimony of the witness Edwin L. Arnold, cashier of the complainant bank, to nullify and make ineffective the said release and receipt."

The basis of this assignment can only be found in the statement of rulings on the admission of evidence, certified by the court (pages 38-41); and the form of the assignment

indicates that counsel intend hereby to raise substantially the same contention as that discussed under the previous assignment, to wit, that *oral* evidence of the character of that given by Mr. Arnold, as shown in said statement, as distinguished from written evidence, "to nullify and make ineffective the said release."

The fallacy of this contention and the misapprehension of the effect of such evidence seem settled by the cases cited in the preceding discussion, both from this court and from the Supreme Court of Porto Rico. The unequivocal answer is contained in a portion of the quotation already made from *Peugh vs. Davis, supra:*

> "As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, *written or oral*, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. *The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument.*"

If counsel should hereafter argue that the objection made to some particular question contained in the statement certified was technically good and the form of such question objectionable, and that it was the purpose of this assignment to bring such objection to the attention of the court, our reply is two-fold: First, that such contention is not properly raised by the form of the assignment; and, second, that the admission of some item of improper evidence is not sufficient ground for reversing a decree, where it appears that such evidence did not materially affect the result.

United States vs. The Burdett, 9 Pet., 682, 689.
Gilbert vs. Moline Plow Co., 119 U. S., 494.
Ivinson vs. Hutton, 119 U. S., 604.
Ruckman vs. Cory, 129 U. S., 387.
Greyson vs. Lynch, 163 U. S., 468, 481.

In the first of the above cases the court said:

> "But it is not material to decide the point raised on the rejection of the letters. They may be considered as a part of the record, and as presenting all the facts which they contain, in connection with the other facts of the case, for the consideration of the court. And if on this broad view of the merits, the prosecution shall not be sustained, it will become wholly unnecessary to determine any question as to the admissibility of evidence."

And in the last cited case occurs the following terse expression:

> "While it is possible that some questions may have been asked of these witnesses which were irrelevant, immaterial, and incompetent, the reception of such evidence, as already observed, does not vitiate the findings of the court, or entitle the party to a new trial."

In the record now before the court the only finding having any relation to the evidence given by Mr. Arnold in answer to these questions objected to is that in the 9th paragraph (page 37), where the court finds various facts from the testimony of Mr. Arnold. Omitting from that paragraph everything in any way referring to the answers in controversy, it would read as follows:

> "(9) From the testimony of Mr. Arnold, the cashier, the court finds that when this instrument was prepared, March 13, 1901, he went to the notary's office and signed it without having much of an idea of what it contained, and when on the stand, during the trial of the case, he seemed to be somewhat surprised at its exact phraseology when some of it was read to him; that when he signed it he had no idea of giving up the mortgage security which the bank held as security for this debt and on the strength of which the loan was made; that there was no agreement or understanding of any character whatsoever between the parties that the making of this instru-

ment should be considered as full payment of the main loan or debt; that he never saw their stock of goods, or any part of it, or went to their store; that they remained in possession of it; that he took it (the bill of sale) merely at their request to protect them and keep them going, and that he surely would not have signed the document to release a note and take a stock of goods as a substitute for a real-estate mortgage which he already had and on the strength of which the bank only made the loan."

And these facts, we submit, would be, in connection with those found in the other paragraphs, amply sufficient to support the decree.

If the objections shown in said statement of rulings should be held open to consideration, framed as the assignment is, we nevertheless submit that such rulings could not have materially affected the result; hence the decree should not for that cause be reversed.

III.

"The decree of the court rendered herein is contrary to the evidence and to the equities of the case."

As the evidence is not contained in the record, and this court would not review it if it was, and as the main contention upon which appellants hope to obtain a reversal of the decree is based upon the want of jurisdiction in the court below to administer equitable remedies or principles, there seems to be nothing to argue under this assignment, especially as the question of the equities between the parties has already been discussed under the first assignment of error.

IV.

"The action of the court in entering a decree in favor of complainant, subject to the mortgage of February 21, 1900, to properties which were subsequently awarded to defendant, Maria de las Nieves Cabrera y Pruna, out of and from the inheritance in the estate

of her deceased mother, which partition and assignment did not take place until after the said mortgage."

The exact meaning of this assignment is not clear, the second clause probably being intended to read "subjecting to the mortgage of February 21, 1900, the properties," etc. However, it seems intended to question the power of the court below to subject to the lien of appellee's mortgage the property inherited by the appellant mentioned from her mother, *because* the partition of the inheritance between the heirs and the assignment of specific portions of the property inherited to said appellant did not take place until after the mortgage was given to appellee.

In the first place, it is to be noted that a distinct allegation of the right of appellee under said mortgage in said appellant's portion of the inheritance from her mother was contained in its bill of complaint (page 2) and no denial of that allegation is contained in her answer (pages 6, 7). Hence no issue was raised regarding it. But, even were it in issue, the court below was right.

The mortgage recites, and the court finds, that her mother was deceased at the time of its execution (page 33), and the court further finds that subsequent thereto and before the decree the testamentary proceedings relative thereto were terminated, and the portion of the inheritance thereby assigned to said appellant was an undivided interest in certain parcels of real estate, which are the same described in the decree (page 35, par. 6; page 24, pars. 2, 3, 4, and 5). As the mother died previous to the date of the mortgage (February 21, 1900), the inheritance was transmitted in accordance with the provisions of the Civil Code there in force previous to the present Civil Code of 1902. This is usually called the Old Civil Code and may be found in English in a War Department translation made in 1899.

By said law then in force the *title* to an inheritance passes

at once and *vests* in the heir or devisee from the moment of death.

> "Art. 657. The rights to the succession of a person are transmitted from the moment of his death.
>
> "Art. 658. Succession is granted either by the will of the man as expressed in a will or, in its absence, by provision of law.
>
> "Art. 659. The inheritance includes all the property, rights, and obligations of a person, which are not extinguished by his death.
>
> "Art. 660. An heir is a person succeeding under an universal title; and a legatee, one succeeding under a special title.
>
> "Art. 661. Heirs succeed the deceased in all his rights and obligations by the mere fact of his death."
>
> Title III, "Successions," Civil Code of 1889.

Following the above sections or articles is chapter first, which treats of "Wills," and chapter second, which treats of "Inheritances," and in this chapter is included—

> "Art. 789. All that is prescribed in this chapter with regard to heirs shall also be applicable to legatees;"

showing that the rights are the same whether the inheritance is by will or operation of law.

The right of heirs or devisees to alienate their inheritance before the "divisoria," as it is called, or division, is made is also recognized by the same Code:

> "Art. 1067. If any of the heirs should sell his hereditary rights to a stranger before the division, all or any of the coheirs may subrogate himself in place of the purchaser, reimbursing him for the value of the purchase, provided they do so within the period of a month to be counted from the time they were informed thereof."

Nor does the Code make any distinction between selling and mortgaging:

"Art. 1874. The following property only can be the subject of a mortgage contract:

"1. Real property.

"2. Property rights in real estate which can be alienated in accordance with law."

All the foregoing are copied from the War Department translation. The English used is not always grammatical nor otherwise to be commended, but the meaning, in these paragraphs at least, is plain. The provisions of the last quoted article (1874) are repeated in the Mortgage Law, article 106.

The Supreme Court of Spain has also construed the law in the respect referred to, holding that an heir or devisee not only has a right to sell or mortgage his interest in the inheritance before the division, but also that such lien or alienation follows the portion of the inheritance subsequently set apart to him.

Jurisprudencia Civil, vol. 66, page 684.
vol. 96, page 853.
vol. 101, page 15.

We therefore think the court will find the fourth assignment of error as unfounded as the three preceding.

V.

Since concluding the foregoing argument, based upon the record and assignment of errors as printed, we have been generously favored by opposing counsel with a copy of his printed brief, and in reply thereto we beg to submit the following comments and considerations:

(1) In counsel's discussion of his first point he argues that, as appellant M[illegible]a de las Nieves had paid in full her contribution to the [illegible] of Sucesores de J. M. Suarez & Co., she could not be held "responsible for its debts to any additional or greater amount." That might be true as to any further responsibility by *virtue of the partnership articles,*

but cannot affect her liability upon a *separate obligation*, voluntarily contracted, for a valuable consideration.

(B) In order to avoid the effect of finding numbered (9), made by the court below, counsel describes it as a "recital of the testimony" of a certain witness. Upon inspection (Record, page 37) the court will see that said finding does more than counsel indicates, and *from* the testimony of the witness *finds* certain facts, as it well might do, as that witness was uncontradicted.

But if finding (9) were not of an "ultimate fact," much less would be such the *verbatim* copies of the instruments contained in findings (3), (5), and (8) (pages 30, 31, and 35); and, with those instruments debarred from consideration, there would be no findings upon which this court could consider the merits of the appeal, but the decree below would be affirmed for want of such findings.

Wilson vs. Merchant's Loan & T. Co., 183 U. S., 121.

(C) Counsel's argument on pages 16 to 18 of his brief, as to the error in the admission of the oral evidence of the witness Arnold, is sufficiently answered by the cases cited under Subdivision II above, but we desire especially to call to the court's attention that the construction given by counsel to certain sections of the Law of Evidence of Porto Rico is directly opposed to that given by the Supreme Court of Porto Rico in the case quoted from in the above part of our brief.

More than that, the action of the trial court herein in admitting evidence of the circumstances of the alleged "release" and of the real agreement and intent of the parties in executing it is supported by a long line of authorities from the Supreme Court of Spain itself:

Juris. Civil, vol. 78, page 494.
vol. 79, pages 232-568.
vol. 86, page 408.
vol. 89, page 121.
vol. 93, page 311.
vol. 97, page 441.
vol. 101, page 615.

In the above-cited case from vol. 83 the court, in explaining the significance of article 1218 of the Civil Code of Spain (which is the equivalent of the article 1186 of our Code, above quoted at the end of Subdivision 1), says (on page 486):

> * * * el art. 1218 del Codigo civil no concede valor preferente, ni menos decisivo, á los documentos publicos en concurrencia con otras pruebas de igual ó diferente clase;

of which the translation is:

> "Article 1218 of the Civil Code does not confer a higher value, and still less a decisive one, upon public documents as compared with other evidence of the same or a different class."

From the above citations it is seen that the Spanish law even permits what our own does not—the admission of oral testimony regarding all the terms of a contract upon equal footing with the writing which evidences it.

(D) In the discussion of his point No. 2, on pages 18 to 20 of his brief, opposing counsel fails to distinguish between the *promissory note*, which was the primary obligation and was signed both by Sucesores de J. M. Suarez & Co. and by appellant Maria de las Nieves, and the *mortgage*, which was given and executed by the *latter alone*. This *mortgage* is the cause of action in the present suit, and in it there is but one party bound, and the condition of her obligation is stated to be that she should "pay the eight thousand pesos, provincial money, *y* (and) interest, of the promissory note of which she is surety, because of (at) its maturity it should not have been paid by Successores of J. M. Suarez." The event upon which she had voluntarily conditioned her obligation having occurred, *i. e.*, the non-payment by the firm of Suarez, that obligation became fixed.

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(E) The next contention of counsel on the other side is that the document of March 13, 1901, constituted a novation. We fail to see any earmarks of such a condition. If it constituted a payment in full of the indebtedness, as counsel elsewhere contends, it was not a novation, but an extinguishment. If the debt was paid, the contracts relating to it were ended, and there remained no *obligation* on the part of anybody. If it were not paid, the findings of the court below distinctly negative the idea of a novation. Nor does counsel explain the application to the facts found of the provisions of article 1203 of the Civil Code which he quotes. Turning to article 1156 of the same Code, we find that obligations are extinguished in six distinct ways, of which *payment* is the first and *novation* is the last. According to said article 1203, the principal feature of a novation is the substitution either of person or object, yet the court expressly finds that the appellee did not give up its mortgage security—in fact, never carried into effect the terms of said instrument (finding 9).

(F) Nothing cited by counsel for appellants under his point No. 4 can overcome the citations in the subdivision IV of this brief. The citations from the Civil Code are the same, while those from the Mortgage Law are not applicable. Clause (5) of article 108 refers to things that "will be owned in the future," and counsel in comment refers to "future hereditary rights of the kind described in the document under consideration." That the language of this clause (5) has no application to an inheritance already *in esse*, but simply remaining undivided, is shown by the language of the Commentator Galindo, quoted by counsel himself on page 24 of his brief, where it is said that the Mortgage Law, in consonance with the Civil Law, is opposed, "especially with respect to successions, to the transfer of an *expectation* of those who have the *presumption* of succeeding a determined person." Such reasoning is in no way inconsistent with the law as cited

by us, simply because it applies to a different thing. So far as the discussion refers to "inscription in the registry," it is further impertinent, because such inscription is only material when dealing with the rights of third parties, and no rights of such parties are involved in the present controversy.

(G) The argument of counsel for appellants under his point No. 5 has already been answered under (D) *supra*.

In conclusion, we respectfully submit that no material error was committed by the court below in entering its final decree herein in favor of the appellee, and that said final decree should be affirmed.

N. B. K. PETTINGILL,
Counsel for Appellee.

CABRERA *v.* AMERICAN COLONIAL BANK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 136. Submitted April 7, 1909.—Decided May 24, 1909.

The provisions of the Spanish Civil Code, which was in force in Porto Rico until 1902, to the effect that the obligations of a contract must be complied with according to their terms and that evidence cannot be introduced to vary them are practically the same as the principles of the common law and are subject to similar well-recognized exceptions.

The face of an instrument is not always conclusive of its purpose; and, in equity, extrinsic evidence is admissible to show that a conveyance, absolute in form, is intended as security; and in this case testimony addressed to the consideration of the bill of sale, and showing that although on its face the vendee agreed to give up its debt the real consideration was to help the vendor and give the vendee additional security, would be admissible under our own, as well as the Spanish, law; and *quære* whether the Spanish law does not permit oral testimony, as to all the terms of a contract upon an equal footing with the written instrument itself, to an extent beyond that which our own law permits.

One guaranteeing a loan by mortgage is not released from the guaranty because the loan is subsequently further secured by a bill of sale of other property, absolute on its face but in fact given as additional security, by the principal debtor.

In Porto Rico one can mortgage an interest in a succession after it has accrued notwithstanding it has not been actually assigned or delivered to the mortgagor; this is not prohibited by articles 108 of the mortgage law, nor are articles 110, 111 of that law applicable thereto.

The liability of one who binds himself with others for the whole debt extends to the whole and not to a part of the debt.

3 Porto Rico, 14, affirmed.

THIS is a suit to foreclose a mortgage given by the appellant, Maria de las Nieves Cabrera y Pruna, to the appellee bank, executed by her on certain property in Porto Rico, to secure a promissory note for 8,000 pesos, provincial money, made

in favor of the bank by a mercantile firm in San Juan, known as Successores de J. M. Suarez y Compania, as principals, and the appellant above named as surety. The Banco Territorial y Agricola was also made a party, but as it disclaimed any interest in the controversy, no further proceedings were taken against it. Magdalena de la Cruz Cabrera y Pruna was made a party because, as it is alleged in the bill, the property mortgaged was conveyed to her by Maria de las Nieves Cabrera y Pruna, who was her sister, for the purpose of depriving the plaintiff (appellee here) of the benefit of its security, and that the conveyance was made without consideration. She answered, denying the allegations, and averred that the conveyance was made upon certain valuable considerations, which were set out.

The answer of Maria de las Nieves Cabrera y Pruna set up that her signature to the mortgage had been obtained by fraud, and that Suarez & Co. had paid the debt secured thereby, that the original note signed by her had been renewed without her knowledge or consent, that the bank had accepted a bill of sale of the stock of merchandise belonging to Suarez & Co. in full payment of the indebtedness, and had executed a public document acknowledging the same. She also averred the good faith of the conveyance to her sister.

The principal contention of appellants in this court turns entirely on the truth of the allegation that the bank had accepted the bill of sale of the stock of Suarez & Co. in full payment of the indebtedness. Of this bill of sale we may say at the outset that the District Court found, and we concur in that finding, that it was not executed with such intention. Appellants, therefore, are limited to the proposition that it had such effect by operation of law. They so contend, insisting that it was a conveyance of property on its face, and that it could not be varied or changed by parol testimony. The District Court having admitted such testimony, it is further contended, committed error. The ruling that parol evidence will not be received to vary a written instrument is elementary,

but the inquiry is, is that ruling so far imperative in Porto Rico that an instrument, though an absolute conveyance on its face, may not be shown as only intended for security?

A statement of some of the facts will exhibit the situation of the parties and their relations to the indebtedness. Previous to the year 1900 Jose Maria Suarez carried on a mercantile business in San Juan, Porto Rico. Shortly before that date he died, and two of his brothers, including his widow, Maria de las Nieves Cabrera y Pruna, one of the appellants, continued the business under a partnership, organized in the early part of 1900, under the firm name and style of Successores de J. M. Suarez y Compania. Suarez had bought the store with his wife's private funds, and owed her at the time of his death 8,000 pesos, and she became a silent partner to that extent, but took no part in the management generally. The partnership being in need of money, borrowed from appellee, on the twenty-first of February, 1900, the sum of 8,000 pesos, equivalent to $4,800 in United States currency, and gave its promissory note to secure the sum, payable in six months, at 9 per cent interest. The note was in the following words:

"$8000.00 Pesos
"$4800.00 Dollars } Either on demand.

San Juan, Porto Rico, February 21, 1900.

"Six months after date, for value received, we promise to pay to the American Colonial Bank of Porto Rico, at the office of the said company, in the city of San Juan, eight thousand pesos M. C. or forty-eight hundred dollars U. S. cy., having deposited with said company as collateral security for payment of this or any other liability or liabilities of ours to said company, now existing, or which hereafter may be contracted, the following property, viz:

"A cession of all the interests of the signers of this in the estate of Nieves Pruna y Vanrosi, and a mortgage on house on Sol street. This note can be renewed with the consent of the cashier of the American Colonial Bank, without prejudice to

the security or collateral, with full power and authority to said company to sell, assign and deliver the whole, or any part thereof, or any substitutes therefor, or any additions thereto, at any broker's board, or at any public or private sale, at the option of said company, or its president, or treasurer, or its or their or either of their assigns, on the non-performance of this promise, or the non-payment at maturity of any of the other liabilities aforesaid, or at any time or times thereafter, without demand of payment, advertisement or notice of sale, which are hereby expressly waived; and after deducting all costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale, or sales, to pay any or all of said liabilities to said company, or its assigns, as its president or treasurer, or assigns, shall deem proper, returning the overplus to the undersigned; and upon any sale at public auction or at broker's board the holder thereof may purchase the whole or any part of such securities, discharged from any right of redemption. And the undersigned agrees to be and remain liable to the holder hereof for any deficiency.

"The company is hereby given a lien upon all moneys held by it on deposit or otherwise, to the credit of the undersigned, and is authorized at any time to appropriate all of said moneys to the payment of whatever may be due on this note, or any other obligations of the undersigned now existing or hereafter contracted, whether the same be then due or not due.

"In case of depreciation in the market value of the security hereby pledged, or which may hereafter be pledged for this loan, a payment is to be made on account, so that the said market value shall always be at least —per cent more than the amount unpaid of this note. In case of failure to do so this note shall be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the company may immediately reimburse itself by sale of the security as hereinbefore provided.

"(Sgd.) MARIA DE LAS NIEVES DE SUAREZ.

"(Sgd.) SUC. DE J. M. SUAREZ & CO."

The note was signed by her as a principal, but the bill alleges that the firm signed as principal, and that she signed as surety, and, to further secure the note, that she executed the mortgage in this suit. It is recited in the mortgage that the note was given by the firm "as direct debtors," and that she executed the mortgage as surety "for the debtors and principal guarantor of the debtors." The mortgage was recorded.

On the thirteenth of March, 1901, a bill of sale upon which the controversy in the case turns was executed before a notary. The instrument recites that it was made by the Mercantile Society, Ltd., doing business under the firm name and style of Successores de J. M. Suarez y Compania, owner of the establishment, the bazaar "Europa," Don Manuel and Ramon Suarez y Cordero, represented by its managing and active partners as parties of the first part, and Mr. Edwin L. Arnold, cashier of the American Colonial Bank of Porto Rico, party of the second part. The bill of sale further recites as follows:

"First. The Society Successores de J. M. Suarez y Cia now is debtor to the American Colonial Bank of Porto Rico in the sum of four thousand eight hundred dollars, due on the 21st of August, last, according to the promissory note which they executed, and not being able to deliver the amount thereof, have offered to make payment thereof in mercantile stocks, according to the detailed inventory which they exhibit, subscribed by the society, and which they take with them bearing my signature and seal, and to which the creditor bank has manifested its conformity.

"Second. That carrying into effect the sale of the stocks set forth in the inventory exhibited, Messrs. Suarez y Cordero in the representation, by which they act, transfer all of the said effects set forth in the said inventory to the creditor bank for the sum of four thousand eight hundred dollars, leaving the same in the possession of the bank, in payment of the said amount of the promissory note above mentioned.

"Third. Mr Edwin L. Arnold accepts this deed; receives the inventory above mentioned and in consequence thereof

says that he leaves in the said establishment of the sellers the 'Bazaar Europa' all the stock and goods which such persons have sold to him in payment for the four thousand eight hundred dollars which they owe to the American Colonial Bank, in order that, for the account and commission of the latter they proceed to realize from the said goods, prices not to be less than those fixed in the inventory, and they are obliged to present to the bank weekly account of sales they may make, together with the value in cash thereof, until the complete realization of the same takes place."

It was signed by Ramon Suarez y Cordero, Manuel Suarez y Cordero and Edwin L. Arnold, cashier.

The District Court found, as we have already said, that the bill of sale was taken as additional security, and that there was no agreement or understanding that it should be considered as full payment of the main loan or debt; that Arnold never saw the stock of goods or any part of it, nor went to the store of the firm, and that the firm retained possession of the goods. Neither of the appellants took part in the execution of the instrument, and, it is found, that no testimony was offered charging them or any of the members of the company with fraudulent conduct. It is also found by the District Court that subsequently the firm went into bankruptcy, that the stock of goods was scheduled as part of the assets of the firm, and that the bank received no part of the assets collected by the trustee in bankruptcy, and distributed among the general creditors of the firm. The District Court adjudged that the bank was entitled to foreclose its mortgage, and entered a decree accordingly.

Mr. Francis H. Dexter for appellants.

Mr. N. B. K. Pettingill for appellee.

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

Appellants, to sustain their contention that the bill of sale

was an absolute conveyance and accomplished payment of the debts to the bank, quote provisions of the Spanish Civil Code which, it is said, was in force in Porto Rico until 1902, which provides that the obligations of contracts must be complied with according to their terms, that their provisions when clear and explicit must control, and that there can be no evidence of the terms of the agreement other than the contents of the writing, unless "a mistake or imperfection of the writing is put in issue by the pleadings" or its "validity" is the fact in dispute.[1]

But these are also the principles of the common law, and absolutely necessary if the written instrument is to be given a distinctive sanction of the agreement of the parties. But there are well-recognized exceptions. The face of an instrument is not always conclusive of its purpose. In equity, extrinsic evidence is admitted to show that a conveyance absolute on its face was intended as security. The rule regards the circumstance of the parties and executes their real intention, and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance, notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be

[1] "Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations." Article 1091.

"Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist." Article 1278.

"If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed." Article 1281.

"Commercial contracts shall be executed and complied with in good faith according to the terms in which they were made and drafted, without evading the honest, proper and usual significance of the written or spoken words with arbitrary interpretations, nor limiting the effects which are naturally derived from the manner in which the contractors may have explained their wishes and contracted their obligations." Article 57, Code of Commerce, 1897, p. 24.

proved. This court said in *Peugh* v. *Davis*, 96 U. S. 332, 336, and repeated it in *Brick* v. *Brick*, 98 U. S. 516: "As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible." The rule which excludes parol testimony, the court further said, has reference to the language used by the parties and does not forbid an inquiry into their object in executing and receiving the instrument. *Hughes* v. *Edwards*, 9 Wheat. 489; *Russell* v. *Southard*, 12 How. 139; *Babcock* v. *Wyman*, 19 How. 289. In *Morgan's Assignees* v. *Strum*, the rule of equity was enforced against the bill of sale of a vessel, though it was enrolled and also insured in the name of the transferee. See *Livingston* v. *Story*, 11 Pet. 351.

It is not contended that the equitable rule is explicit in the Porto Rican code; but it is contended that the power to enforce the rule is given by § 34 of the act of Congress of April 12, 1900, which conferred upon District Courts of Porto Rico, "in addition to the ordinary jurisdiction of Districts Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States," and that they should "proceed therein in the same manner as a Circuit Court." The deduction from this is that the District Court, having the "ordinary jurisdiction" of both Circuit and District Courts, may "proceed in the consideration of any case within that jurisdiction on the same principles," depending on the nature of the case, as those courts may.

Appellee, however, says that it is not necessary to insist upon that proposition because the question presented is the "kind of evidence" which the court was entitled to receive and consider, and the case of *Horton et al.* v. *Roberi*, 3 Castro's Decisiones de Puerto Rico, 410, 415, is adduced to sustain the decision of the District Court in admitting evidence to explain the bill of sale in controversy. The English translation of the decision, given by the appellee, is as follows:

"It seems that the defendant believes, and his whole con-

tention is based on this belief, that for a mortgage to be declared usurious the usury must appear from the document itself. Such an affirmation would convert the law of usury into a dead letter, and is directly in conflict with section 25 of the Law of Evidence of Porto Rico. The appellee also presumes that the object of a written contract cannot constitute the subject of investigation by a court, upon examining into its validity, but that the court must presume that it has been stated correctly in the contract itself. This presumption of the appellee is contrary to the second subdivision of section 101 of the Law of Evidence of Porto Rico and to the law established by the American courts. No matter what motive or consideration is expressed in a written contract, the truth of its provisions is not conclusively presumed, but the same can always be the subject of investigation before a court, and therefore proof can always be proposed and received in order to demonstrate what was the true motive or consideration of the obligation which may be established. See also paragraph 38 of section 102 of the Law of Evidence of Porto Rico."

The law of evidence referred to is inserted in the margin.[1]

Horton v. *Robert* seems to interpret the code as permitting

[1] SEC. 25. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section twenty-eight, or to explain an intrinsic ambiguity, or to establish illegality or fraud. The term "agreement" includes deeds and wills, as well as contracts between parties.

SEC. 28. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that

the application of the equitable rule, and defines the word "consideration" in § 101 to comprehend the *motive* or *purpose* of the instrument. If there is any decision or statute which militates with this conclusion, we feel sure that appellants would have cited it. But we need not distinguish between motive and consideration. The testimony was addressed to the consideration of the bill of sale in its strictest sense. On the face of the instrument the bank engaged to give up its debt for the stock of goods. This then constituted the consideration as expressed, but the testimony explaining it showed that it was not the real consideration, that the real consideration was to keep Suarez & Co. a going concern, and to give the bank additional security. More than this it is not necessary to decide, and we shall not consider, therefore, the contention of appellee and the citations to support it, that the law of Spain "permits what our own does not—the admission of oral

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the judge be placed in the position of those whose language he is to interpret.

"SEC. 101. The following presumptions, and no others, are deemed conclusive: . . .

"2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital or a consideration. . . .

"SEC. 102. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind: . . .

"38. That there was a good and sufficient consideration for a written contract. . . .

"SEC. 107. No evidence shall be considered as conclusive or unanswerable, unless so declared by this act. Laws of Porto Rico, 1905, pages 73, 74, 87, 88, 90."

In the same connection should be considered Article 1186 of the Civil Code of Porto Rico, which reads as follows:

"Public instruments are evidence even against a third person of the fact which gave rise to their execution and of the date of the latter.

"They shall also be evidence against the contracting parties and their legal representatives with regard to the declarations the former may have made therein." Revised Statutes and Codes of Porto Rico, 1902.

testimony regarding all the terms of a contract upon equal footing with the writing which evidences it."

It is, however, contended that, if it should be held that the bill of sale did not pay or discharge the debt, appellant Maria de las Nieves was (*a*) but a guarantor, and her liability must be determined as such. (*b*) The deed of sale was but a novation. (*c*) It constituted under all the circumstances a modification of the security and released her, the guarantor.

All these objections seem (we say seem, because the argument to support them is somewhat involved) to rest on the contention that the bill of sale was not taken as an additional security, and is, therefore, answered by what has been said. Whether she was a guarantor or not, that could not make a mortgage of her real estate any less effective or make the bill of sale something other than what it was. *Joyce* v. *Auten*, 179 U. S. 591.

It is next contended by appellants that the bank "acquired no specific right or interest in the inheritance or participations of appellant Maria de las Nieves Cabrera y Pruna, in the estate of her deceased mother," because, as it is further contended, "that her interest in the estate of her mother had not yet been divided or assigned." There was an allegation in the bill that such interest was covered by the mortgage, which was not denied. Besides, it does not appear that the point was made in the lower court, and counsel say here, after quoting some very general provisions of the Civil Code of Porto Rico, and articles 110 and 111 of the mortgage law, "As we more confidently rely upon the other points in this case, we do not enter into a discussion of the law bearing on this point." We leave the point where counsel has left it. We do not feel called upon to compare the provisions which he has cited with those cited by counsel for appellee, which, it is contended, have a contrary effect, and establish that an heir or devisee has an interest in the inheritance, before the division, which he may sell or mortgage.

It is enough to say that the provisions quoted by appellants

do not sustain their contention. They quote article 1874 of the Civil Code, in force at the time the mortgage was given, as confining a mortgage contract to real property and to rights in real estate which can be alienated according to law. There is no attempt to define such rights other than to quote article 108 of the mortgage law as follows:

"Article 108. The following are not mortgageable:

* * * * * * * *

"(5) The property right in things which, although they will be owned in the future, are not yet recorded in the name of the person who will have a right to own them."

But the interest of Maria de las Nieves in her mother's estate had accrued, and, because it was an undivided interest, did not make it a "property right" to be "owned in the future."

Articles 110 and 111 of the mortgage law are clearly not applicable. They only refer to what incidents of an estate the mortgage of it extends, as improvements, crops, rents, &c.

It is finally contended that if Maria de las Nieves is responsible at all it is only for a part of the debt. This contention is answered in effect by what we have already said. Whether as principal or surety, she bound herself to the bank for the whole debt—mortgaged her property for the whole debt, and her liability extends to the whole debt.

Decree affirmed.